Supreme Court, U.S.
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No. :_____

In the

Supreme Court of the United States

ANTHONY MAHONEY,

Petitioner,

-against-

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The petitioner argued at trial and before both the Appellate Division and the State Supreme Court that it was a Constitutional denial of Due Process and Equal Protection in violation of the Fourteenth Amendment to treat attorneys more prejudicially than all other defendants in a prosecution under *N.J. S.* 2C: 20-9 Theft by Failure to Make Requisite Disposition of Property Received (App. J at 96a) (App. D at 48a). The petitioner further argued before the State Supreme Court that two other leading jurisdictions, New York and California, both prohibit the admission in a criminal trial of the Rules of Professional Conduct (RPC) pertaining to attorney trust accounts. Nonetheless, both the Appellate Division and the Supreme Court ruled that RPC, *Rule* 1:21-6 can be given to the jury in its entirety, "twenty-six sections and subparts, and... four pages long", entailing an attorney's bookkeeping responsibilities related to the practice of law. (App. D at 69a). The Constitutional error is further compounded when one realizes that the criminal statute *N. J. S.* 2C:20-9 specifically exempts any trustee from segregating and keeping the monies in a separate trust account and further permits him to make "disposition" from "his own property" (App. J at 96a).

1. Whether in the criminal prosecution of an attorney, the admission of the Rules of Professional Conduct (RPC) violates the Due Process and the Equal Protection Clause of the Fourteenth Amendment by unfairly prejudicing him through the introduction of prohibitions of a professional nature more restrictive than the penal statute for which he was prosecuted, thus treating an attorney differently and more severely than all other classes under the same criminal statute?

2. Whether denying an attorney in private practice, admission to a Pre-Trial Diversionary Program (PTI) for allegedly having "breached a public trust", because he possesses a license to practice law, is a denial of Due Process and Equal Protection when other licensed professionals are admitted to the same PTI Program and indeed attorneys, who are public officials such as prosecutors, assistant prosecutors, and other local governmental employees are also admitted to the same PTI Program, thus avoiding prosecution and a potential criminal conviction?

3. Whether New Jersey's unique interpretation of *N.J.R.E.* 404 (a) (1), 405 (b) and 406 which are comparable to the Federal Rules of Evidence constitutes a denial of due process by arbitrarily denying the defense the constitutional right to present witnesses contrary to the Due Process Clause of the Fourteenth Amendment and the Compulsory Process and Confrontation Clause of the Sixth Amendment?

LIST OF PARTIES

The parties to the proceedings in this Court are listed in the caption of the present Petition.

CORPORATE DISCLOSURE STATEMENT

Petitioner, Anthony Mahoney, is an individual party. There is no parent corporation or publicly held company involved in the current proceedings.

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OPINION BELOW

The opinion of the New Jersey Supreme Court is reported at _____ N. J. _____ (2006 N. J. Lexus 388). *See* Appendix A.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U. S. C. § 1257(a).

The New Jersey Supreme Court entered an Order and filed an Opinion on April 19, 2006, affirming the Appellate Division reversal of the entire conviction. See Appendix B. Subsequently, on motion for Reconsideration, brought by the State, the court modified its Opinion and Order and filed the same on May 30, 2006. *See* Appendix A. This Petition for Certiorari is filed within (90) days of the entry of the final order for which review is sought, as required by Supreme Court Rule 13.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution Amend. XIV

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Anthony Mahoney's Petition for a Writ of Certiorari arises from the reinstatement of his fourth degree forgery conviction by the New Jersey Supreme Court on a Motion for Reconsideration brought by the State.

The entire judgment of conviction had been reversed by the Superior Court Appellate Division in a reported decision, *State v. Mahoney*, 376 N. J. Super. 63, 868 A. 2d 1171 (2005) on March 17, 2005. (App. D at 48a). An appeal was then taken by the State of New Jersey by Petition for Writ of Certiorari to the New Jersey Supreme Court. The Supreme Court initially affirmed the Appellate Division's reversal of the entire conviction on April 19, 2006. The pertinent pages of the initial filed opinion that were subsequently changed on the State's Motion are at Appendix C at 39a. Subsequently, on the State's Motion for Reconsideration, the New Jersey Supreme Court red-lined certain pages of its April 19, 2006 opinion (App. B at 31a) and reinstated the Fourth Degree Forgery Convictions and reversed and remanded for a new trial on Counts I and II, third degree theft by failure to make required disposition of property (N. J. S. A. 2C:20-9) and third degree misapplication of entrusted property (N. J. S. A. 2C:21-15) without further explanation in their opinion. The full opinion filed on May 30, 2006 is reproduced at Appendix A. However, the State has declined to retry the Petitioner and has moved for a dismissal of the aforesaid two remaining counts of the indictment. (App. H at 92a).

Objection was made at trial to the admissibility of a Rule of Professional Conduct (RPC) *Rule* 1:21-6 (Trust Account Record Keeping) in a criminal prosecution for theft:

> COUNSEL: I do want to place an objection on the record as to the court rule because I don't know that it's relevant. It's not an element of the offense. It's not a crime to be in violation of the court rule....
>
> COURT: That application is denied. I find that it's relevant.
>
> (22T6-4 to 22T8-2).

The Constitutional argument was raised in the Appellate Division brief filed with the court and summarized in the Appellate Division Opinion. (App. D at 50a).

Again, before the New Jersey Supreme Court, the Constitutional violation of due process in the admissibility of the RPC, *Rule* 1:21-6 was raised in the briefs filed with the Court, including the conflict as between New Jersey's position and the contrary holdings of Appellate Courts in New York and California. Likewise, the fact that the forgery charges stem from the same incident as the theft charges and are so interrelated that the erroneous trial court ruling on the RPC Rule 1:21-6 required a reversal of the forgery charges was also presented to the Supreme Court.

The denial of PTI pursuant to guideline 3(i)(4) of *Rule* 3:28 to wit "a breach of the public trust" as it violates the Equal Protection Clause of the Constitution was raised in Oral Argument before the Appellate Division and the facts and reported cases demonstrating its unequal application were briefed to the Appellate Court.

The violation of the Equal Due Process of the Constitution in the determination of a "breach of a public trust" was specifically briefed to the New Jersey Supreme Court, together with the reported decisions demonstrating its unequal application. However, the Court declined to grant

the Cross Petition and hear the issue as it noted in its opinion at footnote (4) four. (App. A at 10a).

The petitioner has been an attorney in New York since 1971 and in New Jersey since 1972. He is a former assistant district attorney of Bronx County, New York; a former Captain in the United States Army, and a Vietnam Veteran. (App. D at 532). In his approximate 30 plus years of private practice, he has never had an ethics complaint or grievance filed against him until as a result of the instant matter.

The one underlying transaction giving rise to the four criminal charges below was an alleged failure to pay a client her $50,000 portion of a settlement in a timely manner. The payment, was, in fact, made on December 30, 1999, five months before any criminal charges were filed by the prosecutor's office and almost one year before an indictment was returned by the second grand jury empanelled to hear the matter.

The petitioner has consistently maintained that any delay in disbursing the funds was due to the legal requirements incumbent in closing out the estate, as well as the petitioner's preoccupation with his recovery from his prior heart attack in 1997, as well as sloppy bookkeeping caused by ill health and the treatment for prostrate cancer, with which he had just been diagnosed in 1999 (App. D at 61a); and, finally, because of a dispute between the client Barbara Ferry and her husband, as to who would be entitled to the settlement monies.[1]

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[1] Her marital infidelities with her husband's friend and the illegitimacy of the son, CJ and her concurrent financial inability to end the marriage formed the basis of their argument over the settlement funds. The argument over the settlement money shortly after CJ's death, that gave rise to the lawsuit and settlement, would not be believed by a jury without the history of infidelity and illegitimacy. The admissibility of

REASONS FOR GRANTING THE WRIT

1. REVIEW IS WARRANTED TO RESOLVE A CONSTITUTIONAL CONFLICT OVER DUE PROCESS BETWEEN THE NEW JERSEY SUPREME COURT AND THE STATE APPELLATE COURTS OF NEW YORK AND CALIFORNIA AS TO THE ADMISSIBILITY OF THE RULES OF PROFESSIONAL CONDUCT (RPC) IN A CRIMINAL TRIAL.

A. The Introduction Of The RPC *Rule* 1:21-6 So Tainted the Jury's Deliberative Process As To Require The Reversal Of The Forgery Convictions.

The California Court of Appeals holds that it is reversible error to instruct a jury on the state's Rules of Professional Conduct with respect to attorney trust accounts, when that same jury is considering charges of embezzlement against the attorney. *People v. Stein*, 94 Cal. App. 3d 235, 156 *Cal. Rptr.* 299, 302-03 (1979). Stein was charged with eighteen counts of grand theft by embezzlement, based on allegations that he "willfully and unlawfully took money entrusted to him by six separate clients. *Id.* at 301. The jury was instructed that evidence presented "*tending* to show that the defendant *may have violated*' the applicable rules . . . may be considered "only insofar as it may tend to prove that

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the underlying causes for the dispute over the money that had arisen between the Ferrys was the subject of a pre-trial motion, denied by the Court. (App. Y at 119a) The issue was raised on appeal but not decided either by the Appellate Division or the Supreme Court. (App. D at 53a) (App. A at 10a)

the defendant possessed the specific intent required. . . . " *Id.* at 302.

The California Court of Appeals reversed the conviction and held:

> [I]t was improper to use the professional rules of conduct to show that a violation of the rules, if any, would tend to prove that defendant possessed the specific intent required when, in fact, the violation of the rules, if any, could have occurred without any criminal intent. Even though the instructions did not presume a violation of the rules, the only reasonable inference that the jury could have drawn was that evidence of a violation was in fact evidence establishing the required intent to commit the crimes charged. [*Ibid*].

The California Court of Appeals further found that the evidence failed to meet the general test for relevancy of indirect evidence because evidence of a violation of the rules "does not tend logically, naturally and by reasonable inference to prove or disprove the state of mind (specific intent) of the crime charged." *Ibid.*

Likewise, when confronted with the same issue, the Appellate Division in New York held that the trial judge's charge to the jury about the relationship between attorney and client and specifically an attorney's fiduciary duty in "holding any money he collects for his client and advising the jury that an attorney must segregate his clients funds from his own and must never allocate them to his personal use", was such that it may have unfairly prejudiced the defendant's case. *People v. Leonard,* 430 N.Y. Supp. 2d 4 (1980). The New York Appellate Court wrote that "permitting the jury to consider the duty an attorney owes to his client may have unfairly prejudiced defendant's case by

introducing prohibitions of a professional nature more restrictive than those contemplated by the penal statute for which defendant was prosecuted". (*Leonard*, supra. 5).

Certainly, in the within matter, it was not only an abuse of discretion for the trial court to permit the rule in its entirety to be admitted to the jury, but more importantly, it was a Constitutional violation of Due Process and Equal Protection under the Fourteenth Amendment because there is no statutory requirement under the criminal statute, *N.J.S.* 2C:20-9 that the funds be maintained in a trust account or that the trust account be balanced and be maintained pursuant to *N. J. Rule* 1:21-6. Specifically, the criminal statute, *N. J. S.* 2C:20-9 even provides that an accused can make disposition "from his own property". (App. J at 96a). Therefore, the criminal statute specifically does not require segregation of the trust funds as does the *RPC, Rule* 1:21-6. (App. M at 99a).

Federal Circuit Courts of Appeal have been sensitive to the "interrelated" and "spillover" effect on the remaining counts of an indictment after a dismissal of those counts that are directly affected by the trial court error. Specifically, the Court of Appeals in *United States v. Berkery*, 889 F. 2d 1281, 1285 (3d Cir. 1989) held that the conviction on Count I, charging the defendant with engaging in a conspiracy to possess and distribute P2P, must be reversed because coerced and constitutionally invalid admissions were utilized. The question remaining was whether Counts 2-14 which charged the defendant with the substantive offenses of possession and distribution of P2P had to be dismissed. The Court found that they were closely "intertwined" with Count I and reversed the convictions because of the potential for confusion on the part of the jury.

Id at 1285.

Again in the case of *United States v. Pelullo*, 14 F. 2d 881 897, 898 (3d Cir. 1994), the Court of Appeals found that even though "the evidence for Count 54 and the other 48 wire fraud counts was technically distinct because different transactions were at issue. . . . [nonetheless] the jury may well have been confused because much of the evidence on all counts was similar." (*Pellullo*, supra. 898).

Criminal statutes are to be applied uniformly to all accused. It is a violation of constitutional dimensions and a denial of Due Process and Equal Protection under the Fourteenth Amendment to have special rules applicable for attorneys in order to more easily prosecute them as opposed to all other citizens under *N.J. S.* 2C:20-9. What the State did in this instance with the introduction of *Rule* 1:21-6 was to alter the burden of proof required for a criminal conviction against one group of defendants.

B. The Forgery Charges Stem From The Same Incident As The Theft Charges And Are So Interrelated That The Erroneous Trial Ruling On The RPC 1:21-6 Requires A Reversal Of The Forgery Charges.

The crime of forgery is not complete with the mere uttering of a forged instrument. It is complete only if it is uttered with the intent to defraud or obtain a benefit thereby. (App. I at 95a). The state was required to prove intent to defraud. If the check had been endorsed by petitioner and deposited into his personal account, the requisite intent could perhaps, have been inferred from that action. However, that did not happen. Rather, it was deposited into the trust account from which the disbursement was ultimately made. (App. D at 60a).

The center of the state's case was the purported delay in the disbursement. The petitioner testified that the delay and the errors in the trust account were occasioned by ill

health, sloppy bookkeeping, and a dispute between the Ferrys. (App. D at 61a). Even though throughout 1999, $947,000 dollars went through the number 116 trust account from which the Ferrys were paid, the state sought to counter that with evidence that the trust account was out of trust at a particular moment in time and that the petitioner was not in compliance with *Rule* 1:21-6. (App Q ay 110a) Thus, from the state's perspective, the introduction of *Rule* 1:21-6 to the jury was necessary for the state to prove the intent required under the forgery counts.

The alleged actions of the petitioner arise out of the one transaction. The State's case was that the petitioner forged the Ferrys' signatures in order to steal the money despite written notice to them of having received the check. (App. D at 56a) (App. A at 42a) There could have been no theft unless the check was negotiated and deposited into an account. The introduction of *Rule* 1:21-6 was necessary, from the state's standpoint, to prove the requisite intent for both the forgery charge and the misappropriation charge. It must be noted that the matter before this Court involved only one transaction, wherein the assistant prosecutor argued during summation, that the alleged forgery and theft were intimately connected because it was the petitioner's intent "to defraud the (Ferrys)" and "commit the theft". (App.W).

A fair reading of the excerpted pages of the New Jersey Supreme Court's opinion as initially filed on April 19, 2006 (App. C) makes it quite obvious that the entirety of petitioner's conviction was remanded for a new trial. Clearly, that would be the obvious outcome when multiple counts of an indictment revolve around a single occurrence or transaction.[2] *See, State v. Wines*, 47 N. J. Super. 235, 238,

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[2] It is not the province of the Court to second guess the jury's thinking. In *Bollenbach v. United States*, 326 U. S. 607, 66 S. Ct. 402, 90 L. Ed. 350 (1946), the Court stated " In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that

135 A. 2d 543 (App. Div. 1957); *See, Brooks v. Maryland*, 299 Md. 146, 472 A. 2d 981 (Md. 1984). There, the Maryland Court of Appeals held that when all three crimes of which the defendant was found guilty, stemmed from the same incident and were interrelated; the trial judge's erroneous ruling on the conspiracy charge required reversal of the other two charges of armed robbery and carrying a deadly weapon with intent to injure. In *State v. Lapierre*, 754 A. 2d 978 (Me. 2000), a conviction for conspiracy to traffic in scheduled drugs was vacated, as it was inextricably tied to conviction for unlawful trafficking in scheduled drugs, which was vacated due to incorrect jury instructions. Again, in *People v. Looney*, 46 Ill. App. 3d 404, 361 N.E. 2d 18, wherein the Illinois Appellate Court held that a defendant, who was tried jointly for battery [leaving a store parking lot with security officer hanging onto passenger side of van, and subsequently thrown to pavement and injured] and for theft [shoplifting] and convicted for each offense, it was the error in the jury instruction on battery that required reversal of both convictions and a new trial. *Looney*, supra.

II REVIEW IS WARRANTED TO RESOLVE THE ARBITRARY AND UNCONSTITUTIONAL OPERATION OF NEW JERSEY'S PRE TRIAL DIVISIONARY PROGRAM INVOLVING A "BREACH OF THE PUBLIC TRUST".

Denial of Admission into the Pre-Trial Intervention Program (PTI) was an arbitrary, patent and gross abuse of

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Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be". *Bollenbach*, 326 U.S. at 615, 66 s. Ct. at 406.

discretion by the state in the application of the standards for admission to the PTI Program pursuant to statute *N. J. S.* 2C:43-12-13 and 14 and N. J. Court *Rule* 3:28 under guideline 3 (i) (4), which state action, pursuant to the Fourteenth Amendment to the Constitution, constituted a denial of Due Process and Equal Protection under the Law and a complete miscarriage of justice. The alleged basis for the denial of PTI was the State's claim that the petitioner fell within a group presumptively excluded under guideline 3 (i) (4) of N. J. Court *Rule* 3:28 to wit: his crime was a "breach of the public trust." However, the petitioner was not a public employee but rather an attorney in private practice. (App. A at 1). He held no public office; he was paid no money or salary as a public employee, and he held no public or tax monies in trust. The offense of Forgery in the fourth degree for which he stands convicted involved a check from the Harleysville Insurance Company payable to the petitioner and his clients, Clark and Barbara Ferry, which was deposited into his attorney's trust account. (App. D at 60a).

On appeal, the Appellate Division of the Superior Court came to the conclusion that "although defendant's status as a lawyer does not operate as a per se impediment for consideration for enrollment into PTI, we are satisfied that the trial court correctly determined that defendant failed to show, by clear and convincing evidence, that the prosecutor's application of the presumption of ineligibility articulated in Guideline 3(i) (4) constituted a patent abuse of discretion." (App. D at 86a).

The only "presumption of ineligibility" raised by the prosecutor was "a breach of the public trust", which presumably was committed by the petitioner, an attorney in private practice, when a delay in payment resulted in an alleged fiduciary breach between himself and a private client. For there were no public funds, public office,

governmental service or tax monies involved in his private fiduciary relationship with his client.

The petitioner again raised the issue of the denial of PTI and the fact that he was not a public official in his cross-petition for certification before the New Jersey Supreme Court, which cross-petition was denied as noted in footnote 4 of the Court's opinion. (App. A at 10a).

The petitioner was eminently qualified for enrollment into the Pre Trial Intervention Program (PTI) because he had no prior criminal record; the charges were third and fourth degree offenses; there was no loss of money to the complaining witnesses and therefore no need for restitution, for they were fully paid five (5) months before the Prosecutor's detective filed a criminal complaint and about one year before an indictment was handed down by the second grand jury empanelled to hear the matter.[3] In his thirty years of legal practice in both New York and New Jersey, he had an unblemished record with no ethics or grievance complaints filed against him. Further, his exemplary military service in Vietnam; his experience and service as an Assistant Bronx District Attorney and his severe life threatening illnesses and his contemporaneous health problems that impacted upon client representation and record keeping were all factors that the State should have taken into consideration under the guidelines but did not. (App. D at 53a, 61a, 62a).

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[3] Bank and trust account records subpoenaed before the first Grand Jury panel revealed that checks drawn on petitioner's trust account in January 1999 were to clients who were related to his paralegal and who shared the same last name as her. However, testimony and evidence further showed that the checks were for legitimate real estate transactions and loan payments for which petitioner had represented them as clients, all contrary to the prosecutor's initial theory of a wider conspiracy and theft. (T96-99).

Additionally, the crimes, for which he was charged, are typically referred to a pre-trial diversionary program for first time offenders. In an article published in the *Journal of Federal Probation by Thomas E. Ulrich* entitled Pretrial Diversion in the Federal Court System, the statistical analysis showed that in "26 percent of all pretrial diversion cases reported, the major offense charged was fraud....Cases in which the major charge was larceny or theft constituted the next largest category, with 25 percent of all divertees..."

(*Fed. Prob. Vol.* 66 *No.* 3, p. 31).

Further, the decision of the Appellate Division herein on this issue is also opposite the opinion of another Appellate Panel reported at *State v. Mason*, 355 N. J. Super. 296, 303, 304, 810 A. 2d 88 (2002). The *Mason* decision held that even a private individual engaged in private employment, who does however, provide services to the public, specifically, education of children, funded by tax dollars, is not by virtue thereof a public servant who can be guilty of "official misconduct".

Furthermore, there are significant reported cases in New Jersey wherein attorneys who were public officials, actually employed by the State and other governmental subdivisions, as well as other public employees, were all admitted to Pre Trial Intervention (PTI). Specifically, the Court's attention is directed to the following reported decisions:

(i) *In the Matter of Frank J. Hoerst, III*, 135 N. J. 98, 638 A. 2d 801 (1994). (Hoerst was both an attorney and the Prosecutor for Salem County, New Jersey, when in June of 1990 a State Grand Jury returned a seven count indictment against him. The Division of Criminal Justice investigation alleged over $380,000.00 in misappropriated public funds. The Hoerst case is particularly instructive. Not only was

Hoerst an attorney and a public official holding the public trust, but he was also charged with a second degree offense, which is presumptively excluded from the program. Nonetheless, he was admitted to PTI.

(ii) *Matter of Asbell*, 135 N. J. 446, 640 A. 2d 837 (1994). Samuel Asbell was the former Camden County Prosecutor and an attorney. He staged an assassination attempt on his own life in order to gain sympathy for reappointment. He plead guilty to knowingly filing a false police report, *N.J.S.A.* 2C:28-4(a). He was admitted to PTI with the consent of the Attorney General's office.

(iii) The *Matter of Farr*, 115 N. J. 231, 557 A. 2d 1373 (1989). Assistant Prosecutor Farr of Somerset County was admitted to PTI while facing charges involving his unauthorized removal of marijuana and PCP from the Prosecutor's evidence room and providing it to others, as well as himself. Further, he was charged with continuing a social relationship with informants after their arrest and providing the informants with information helpful to the defense of a criminal case against them and further handling and participating in the prosecution of the case. He was allowed to successfully complete the PTI Program.

(iv) *Kerwick v. Trenton*, 184 N. J. Supr. 135 (Law Div. 1982). Police Officer Kerwick was indicted for misconduct in office and filing a false police report, as well as charged with a possessary drug offense. He was admitted to PTI and after he successfully completed the supervisory program, the charges were dismissed and order was signed expunging the arrest and all records relating to the indictment.

(v) *Cressinger v. Board of Education*, 256 N. J. Super. 155 (App. Div.) 606 A. 2d 849, *cert. denied*, 130 N. J. 394, 614 A. 2d 617 (1992). Cressinger was the Supervisor of Custodians for the Newark Board of Education, who, pursuant to her job, was required to travel throughout the different schools in the system. While driving from one school to another, Cressinger's vehicle collided with a van killing one of the van's passengers. Cressinger was indicated for first degree aggravated manslaughter in violation of *N.J.S.* 2C:11-4c and eventually accepted into the PTI program and the indictment was dismissed.

(vi) *Thomas v. N. J. Institute of Technology*, 178 N. J. Super. 60, 427 A. 2d 1142 (Law Div. 1981). Thomas was an assistant in the Bursar's Office of a state college when he was charged with embezzlement. He was also allowed to enter the PTI program.

(vii) *Delrossi v. DHS*, 256 N. J. Super. 286 606 A. 2d 1128 (App. Div. 1992). Delrossi, a police sergeant with the provisional title of lieutenant was indicated and charged with third degree theft, hindering prosecution, and third degree conspiracy to commit theft. He was permitted to enroll in Pre Trial Intervention Program and upon completion the indictment was dismissed.

Clearly, the facts herein argue persuasively of a denial of Due Process when those in high public and state offices, such as County Prosecutors and an assistant to the Bursar of a State College, embezzle state funds and are admitted to PTI and the petitioner, an attorney in private practice, suffering severe and life threatening illnesses that, in part, cause a delay in disposition of funds but no loss of money to the complaining witness, is denied admission to PTI. This inequality of treatment is especially glaring herein, given that the Appellate Division wrote in its opinion

"There was a legitimate and critical threshold issue for the jury to decide; that is, whether an actual crime had been committed." *State v. Mahoney* (App. D at 67a).

III. THIS COURT'S GUIDANCE IS WARRANTED TO RESOLVE A CONFLICT BETWEEN NEW JERSEY AND OTHER STATE AND FEDERAL APPELLATE COURTS IN INTERPRETING "A BREACH OF THE PUBLIC TRUST"

A New Jersey's Decision Herein Is In Conflict With Federal And State Law.

Under the Federal Pre Trial Diversion Program, it is specifically stated under the Eligibility Criteria that "A public official or former public official accused of an offense arising out of an alleged violation of a public trust" is not someone who can be diverted by the U. S. Attorney. (USAM 9-22-100). Accordingly, the federal program defines a breach of the public trust as being committed by a public official.

The historical definition of a "breach of a public trust" has always involved the holding of public office by the accused and his appropriation of money or property which came into his possession by virtue of his office or by virtue of some duty or authority conferred by statute. Further, the "money embezzled must be public money or it must be received for, or on behalf of, or for the account of, the State or other governmental agency". (29A *C.J.S.* § 25 at 36).

The New Jersey Supreme Court briefly touched upon this issue in *State v. Bender*, 80 N. J. 84 (1979), which case involved a licensed pharmacist. However, the Court chose not to decide the issue at that time. Bender's activities involved the diversion and use of cocaine. He was indicted in April 1976, for seven drug related offenses including theft

of cocaine from his employer for over a four year period. *Bender*, supra., p. 91. Bender made financial restitution to his employer. The Appellate Division in Bender held that because he was a licensed pharmacist, his crime constituted a breach of the "public trust". On certification, the New Jersey Supreme Court found that only the defendant and his immediate employer were victimized and therefore the Court did not have to decide the issue of whether because of his license he had "breached a public trust." *Bender*, supra., 96. In the present matter, even though disposition and payment were made and the client, Barbara Ferry, suffered no financial loss, and unlike *Bender*, supra., no restitution was required, the Appellate Division, nonetheless, upheld the prosecutor's decision of a denial of PTI under guideline 3(i)(4) because of an alleged abuse of a "public trust". The reasoning contained in the Appellate court's decision below is clearly opposite the New Jersey Supreme Court's opinion in *Bender*, supra. and contrary to the Appellate Division's own finding that there is a question "whether an actual crime had been committed". (App. D at 67a). As noted above, it is also opposite the opinion of a different appellate panel reported in the case of *State v. Mason*, supra. *See* also *State v. Williams*, 189 N. J Super. 61, 66 App. Div., *certif. denied* 94 N. J. 543 (1983).

The issue of eligibility under the guidelines for the Pretrial Diversionary Program and the need to adhere to and enforce the guidelines in a non-discriminatory manner, has been a topic agreed upon by commentators and other state and federal appellate courts. The National Association of Pretrial Services Agencies has updated its Performance Standards and Goals for Pretrial Release and Diversion in August 1995. Specifically, under Chapter 2 Eligibility, it has written at subparagraph 2.3 that "formal Eligibility Guidelines should be established and reduced to writing...The Guidelines should be distributed to all interested parties." Further, at subparagraph 2.5, the

Association further writes "Pretrial Diversion Programs have an affirmative obligation to insure that agreed upon eligibility guidelines are adhered to and honored by other actors in the criminal justice system."

This Court has made clear that undue vagueness in a statute is constitutionally impermissible where that uncertainty pertains either to the persons within the scope of the statute, [2] the conduct forbidden by the statute, [5] or the punishment that may be imposed by the statute.[6] The void-for-vagueness doctrine is premised upon the due process clauses of the Fifth and Fourteenth Amendments. See *Connally v. General Constr. Co.*, 269 U. S. 385, 391 (1926). As the *Connally* Court stated, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Id.* This early and basic test has remained essentially unchanged; the test focuses both on actual notice to citizens and the potential for arbitrary enforcement. *See, e.g., Kolender v. Lawson*, 461 U. S. 352, 357 (1983). Under this standard, New Jersey's Pre-Trial Diversionary Guideline for a "breach of the public trust" cannot pass constitutional muster. Additionally, this Court has consistently ruled that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," *Rewis v. United States*, 401 U.S. 808, at 812, 91 S. Ct. at

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[2] *See, e.g., Lanzetta v. State of New Jersey*, 306 U.S. 451 (1938) (Court held that a statute that made it a penal offense to be a gangster was unconstitutionally vague).

[5] *See, e.g., Colautti v. Franklin*, 439 U.S. 379 (1979) (Pennsylvania statute requiring abortionists to exercise the same degree of care to preserve a viable fetus' life and health as in the case of a fetus intended to be born alive was unconstitutional).

[6] *See, e.g., United States v. Evan*, 333 U.S. 483 (1948) (Where statute was vague and inconsistent as to penalty to be applied for its violation, the Court refused to enforce the statute).

1059. *See also, United State v. Enmons*, 410 U. S. 396, 411, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973).

Moreover, of particular concern in a vagueness analysis is the potential for arbitrary enforcement. *See, e.g., Kolender*, 461 U. S. at 357, 358. The Fourth Circuit wrote in 1988 with regard to Pretrial Diversionary Programs that "prosecutorial discretion is not totally unfettered. The government may not selectively prosecute a defendant based upon arbitrary classifications...and although there is no requirement that a pretrial diversion program be created and operated in any district, if one is created, it cannot be managed in an unconstitutional or discriminatory manner." *U.S. v. Richardson*, 856 F. 2d 644 (4th Cir. 1988). Clearly, in the case below, the State has failed to define a "breach of the public trust" as does the Federal Guideline which specifies that it is committed by "a public official or former public official" (*USAM* 9-22-100). Accordingly, in New Jersey, the State is able, on the one hand, to grant PTI to high public officials, who are also attorneys and who clearly have breached a "public trust" by allegedly embezzling hundreds of thousands of dollars and on the other hand, the State can deny PTI to an attorney in private practice, who is not on the public payroll and who handled no public money but who allegedly delayed in making disposition to a private client.

IV. NEW JERSEY'S UNIQUE INTERPRETATION OF N.J.R.E. 404 (a) (1), 405 (b) AND 406 CONSTITUTES A DENIAL OF DUE PROCESS BY ARBITRARILY DENYING THE DEFENSE THE CONSITUTIONAL RIGHT TO PRESENT WITNESSES CONTRARY TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE COMPULSORY PROCESS AND CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT.

This Court has consistently held that a State "may not apply a rule of evidence that permits the witness to take the stand, but arbitrarily excludes material portions of his testimony." (*Rock v. Arkansas*, 483 U.S. 44, 55, 97 L. Ed. 2d 37, 107 S. Ct. 2704).

Likewise, the Court has held that when a State rule of evidence conflicts with the right to present witnesses, the rule may "not be applied mechanistically to defeat the ends of justice," but must meet the fundamental standards of due process. *Chambers v. Mississippi*, 410 U.S. 284, 302, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973).

In the case below, the New Jersey Supreme Court wrote that the trial judge refused "to allow defendant to present (eight) character witnesses to testify either as to defendant's general character traits as an attorney or to specific instances of interactions with defendant". Further, the Court noted that "Some of these character witnesses could have been fairly characterized as hybrid fact/character witnesses." (App. A at 12a).

A critical element of the defense case was the good character and opinion of the accused had in the legal community, as well as among the community of litigants that

he had served and represented, his clients. For almost 30 years, the petitioner had practiced in New York and New Jersey as an attorney, and he had represented over 2,500 clients, many on numerous matters. (App. Q). He never had a grievance or prior ethics complaint lodged against him for anything, let alone a misappropriation of clients' monies. The defense had numerous character witnesses who would testify for the petitioner. The witnesses were prepared to testify at length as to their multiple interactions with him and also about which instances led them to their ultimate opinion as to his character and, most importantly, his honesty.

On September 15, 1992, the Supreme Court of New Jersey adopted N. J. Rules of Evidence *N.J.R.E.* 101 to 1103 which "in general adopted the substance and language of the federal rules". *(Biunno, Current N. J. Rules of Evidence; Report to N. J. Supreme Court by the Committee p. x) (Gann). New Jersey Evidence Rule* 404 (a) (1) and 405 (b) specifically permits "the admission of a pertinent trait of the accused's character" as do the comparable Federal Rules of Evidence. (App. N at 107a). The trial court's interpretation of these rules however, was different from the expressed language of the rules themselves. Specifically, the trial court held that the defendant's character witnesses could not testify with regard to any specific instances which gave rise to their opinion of petitioner's character. (App. R at 112a).

The trial court essentially blurred the distinction between character testimony, which is admissible pursuant to *Evidence Rule* 404 (a) (1) and 405 (b), and reputation evidence which is admissible pursuant to *N.J.R. E.* 803 (c) (21) or *Fed. Rule Ev.* 803 (21). The court limited the character witnesses to net opinions; as to what their opinions were of the petitioner as to his character traits for trustworthiness, truthfulness and integrity given in response to leading questions. (App. S at 113a).

The New Jersey Supreme Court, in reversing the opinion of the Appellate Division on this point involving character testimony, overlooked the fact that Evidence *Rule* 405 (b), in both the Federal and State Rules, permits specific instances of conduct when character is in issue in the case. In the within matter, the character of the petitioner was clearly in issue, if not the pivotal area of inquiry. The Appellate Division correctly pointed this out when it wrote that the petitioner's "traits of care as an attorney" and his "professional relationship with other clients" directly related to the evaluation that the jury had to make with regard to his character and conduct on this one occasion involving the Ferrys. (App. D at 64a).

Moreover, at the request of the prosecutor, the trial court required that each character witness undergo a mandatory *Rule*104 Hearing prior to testifying before the jury. Each witness would then testify as to the specific instances and dealings that he or she had with the petitioner. At the conclusion of each hearing, the court would allow the witness only to testify as to his or her ultimate opinion and the witnesses were prohibited from testifying as to the circumstances and dealings that they had with the petitioner that brought them to that opinion. The trial judge specifically directed defense counsel to use leading questions to elicit the net opinions thereby excluding the factual foundation and dealings which the witnesses had with the petitioner. (App. T at 114a).

The petitioner was denied his rights under the Compulsory Process and Confrontation Clause of the Sixth Amendment for a meaningful opportunity to present a complete defense. As Justice O'Connor wrote in *Crane v. Kentucky*, 476 U. S. 683, 690, 90 L. Ed 2d 636, 645, 106 S. Ct 2142 "whether rooted in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the

Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense". *California v. Trombetta*, 467 U.S. at 485, 81 L. Ed. 2d 413, 104 S. Ct. 2528. The defense continually argued to the trial court, that the witnesses were both a combination of fact and character witnesses, some of whom were clients who observed the petitioner over decades representing them in trying situations, under stress, and who consequently formed opinions about his character and moral conduct as a result of those specific interactions. Their testimony was meant to be in stark contrast to the within incident complained about by the Ferrys. Their testimony was made meaningless by the trial court's rulings.

Teresa Kazista, an attorney, testified in the 104 Hearing that she knew petitioner since she was 16 years of age, for a total of approximately 21 years. She began working for him when she was a sophomore in high school, as a file clerk in his office and she worked throughout high school, college years, when she attended Rutgers in New Brunswick, throughout law school, and as an associate after passing the bar. Her work was initially secretarial and then paralegal, law clerk and then as an attorney. On a crucial issue involving stress at work, she was specifically precluded from giving her opinion. [7]

Obviously, this fact testimony from someone who was intimately familiar with the workings of the office for decades and dealing with the deadlines in litigation and the clients, was critical information for the defense to present to a jury. Specifically, the petitioner testified that after the heart attack, he had to reduce the level of stress. Not only did his physicians verify that would be the appropriate thing

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[7] Court: "What I am precluding from testimony is your opinion of the stressful nature of the job"... (18T22-10-15).

to do but even the State expert, Dr. Oriscello had to acknowledge that reducing stress was important.

(App. U at 115a).

Ronald Ginsberg testified as to the petitioner's practice of explaining many commercial documents, answering all questions and inquiries and responding to telephone calls promptly. Nonetheless, the Court ruled that these numerous instances would not constitute his practice or routine and were therefore inadmissible. The Court excluded such testimony even thought the witness previously testified in the 104 Hearing as to the petitioner's practice. (App. V at 116a).

Essentially the court so diluted the evidence of character testimony as to make its weight and sufficiency almost meaningless to the jury. The witnesses were not allowed to give evidence of the specific instances which gave rise to their ultimate opinion, even though *Evidence Rule* 404 (a) (1) specifically permits same.

The Appellate Division wrote:

> Here, the trial court erred when it precluded testimony about defendant's traits of care as an attorney. Under N. J. R. E. 404 (a) (1), defendant was entitled to present testimonial evidence attesting to his professional relationship with other clients. Such evidence directly relates to the crucial issue in this case, to wit, whether defendant's failure to turnover the settlement funds in a timely fashion is indicative of a criminal intent to perpetrate a theft, or of mere negligence brought about by sloppy recordkeeping and poor health.

> The court also erred when it excluded the testimony of witnesses' personal experiences with defendant that formed the basis for their opinions of his character. Without such a foundation, character testimony is reduced to a net opinion. In evaluating the value and legitimacy of the witnesses' opinion, the jury is entitled to consider the experiences that the witness and defendant have shared, and how they illuminate and reveal the content of a person's character. (App. D at 64a-65a).

Thus, certiorari is warranted to resolve a split between the New Jersey Supreme Court and the other State Courts of Appeal as to whether the Rules of Professional Conduct pertaining to attorney trust accounts are admissible into evidence by the State, against an attorney, in a criminal prosecution for alleged theft and further, the Court's guidance is warranted to resolve a conflict between New Jersey and other state and federal appellate courts in interpreting whether a "breach of the public trust" is broadly applicable to licensed practitioners in private practice.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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Petitioner, Pro Se

APPENDIX - A

SUPREME COURT OF NEW JERSEY
A-10 September Term 2005

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

ANTHONY M. MAHONEY,

Defendant-Respondent.

Argued January 31, 2006 - Decided April 19, 2006 - Refiled May 30, 2006

On certification to the Superior Court, Appellate Division, whose opinion is reported at 376 N.J. Super. 63 (2005).

Michael J. Williams, Deputy Attorney General, argued the cause for appellant (Zulima v. Farber, Attorney General of New Jersey, attorney).

Dennis M. Mahoney argued the cause for respondent (Mr. Mahoney and John Morelli, on the briefs).

Jeffrey S. Mandel argued the cause for amicus curiae, Association of Criminal Defense Lawyers of New Jersey (Pitney Hardin,

attorneys).

JUSTICE RIVERA-SOTO delivered the opinion of the Court. Defendant Anthony Mahoney, a practicing attorney at law in this State, was convicted by a jury of stealing client funds entrusted to him. The jury determined that defendant committed a series of crimes by delaying the disbursement of funds owed to his clients, and by forging endorsements on a settlement check and depositing it without authorization. On defendant's appeal, the Appellate Division reversed, holding that "the trial court improperly excluded substantial portions of proffered testimony by defendant's character witnesses [;]" that "[t]he trial court also improperly submitted to the jury the full text of Rule 1:21 -6. . . . [and failed] to provide instructions to the jury on how to consider and apply the Rule's directives to the facts of this criminal case [;]" and that "certain statement made by the prosecutor during summation were so egregious that they deprived defendant of his right to a fair trial." State v. Mahoney, 376 N.J. Super. 63, 72-73 (App. Div. 2005).

We disagree with two of the three conclusions advanced by the Appellate Division. We hold that the trial court's limitation on the testimony of defendant's proffered character witnesses, prohibiting any testimony either as to specific interactions with defendant or defendant's skills as a lawyer, was proper. We also hold that the complained-of closing argument statements by the prosecutor did not deny defendant a fair trial. However, we do agree wit the Appellate Division that the submission to the jury of the plain text of R. 1:21 - 6 - - a rule of court that details an attorney's recordkeeping and trust fund accounting requirements - - without appropriate guidance from the court was error. Therefore, we affirm in part and reverse in part the judgment of the Appellate Division, reinstate defendant's fourth-degree forgery convictions, and remand for a new trial on the remaining counts of the indictment charging

defendant with third-degree theft by failure to make required disposition of property and third-degree misapplication of entrusted property.

I.

As of the time relevant to this appeal, defendant has been licensed as an attorney at law in the Stat of New Jersey for almost twenty-eight years, the greater part of which was spent in partnership with his brother, who also is an attorney at law. Although defendant's practice included some transactional work, defendant focused almost exclusively on litigation matters. It was as part of his litigation practice what defendant was engaged to represent Clark and Barbara Ferry in connection with the wrongful death of their twenty-one year old sone, Clark Jr., who was struck and killed by a car in February 1998 as he was crossing a road late at night.[1] Later that spring, when the insurance carrier for the driver of the car who struck their son sought to contact the Ferrys, they asked defendant to handle the matter for them.

In December 1998, after some initial contacts between defendant and the insurance carrier, defendant sent a retainer agreement to Barbara Ferry. After reaching agreement on the terms of defendant's retention and compensation, Mrs. Ferry signed the retainer agreement as administratrix ad prosequendum of er deceased son's estate. The execution of the retainer agreement was followed by a January 4, 1999 meeting

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[1] This was not the first time defendant had been retained by represent the Ferrys. As the Appellate Division noted, the Ferrys were childhood friends of defendant's secretary and defendant had represented members of the Ferry family three separate times since the mid-1980's, most recently the successful criminal defense of their son Clark, Jr. in 1997. State v. Mahoney, super, 376 N.J. Super. At 74.

at the Ocean County Surrogate's Office between the Ferrys and defendant, where both the Ferrys applied for appointment as administrators ad prosequendum of their son's estate. This commonplace meeting and appearance at the Surrogate's Office takes on added significance in light of later events.

Approximately eight days later, the Ferrys received a letter from the insurance carrier advising them that the claim concerning their son's death had been settled for the sum of $75,000. Tha t letter also informed the Ferrys that a check in that amount, made payable to "Clark Ferry & Barbara Ferry, as Administrators Ad Prosequendum [of the] Estate of Clark Ferry, Jr., and Mahoney & Mahoney, as attorneys," had been sent to defendant. The testimony concerning the receipt of this letter was in some conflict. According to Barbara Ferry, she did not read the letter from the insurance carrier when it arrived. She left it for her husband to read and they did not discuss its contents until October 1999. In contrast, Clark Ferry testified that when he read the letter from the insurance carrier, he discussed it with his wife and asked her to call defendant for clarification of its contents. In either event, Barbara Ferry telephoned defendant in March 1999 inquiring whether the settlement funds, net of defendant's fees and expenses, could be released to them.[2] She was told by defendant that he could not do so because he was still waiting for certain tax releases.

In April 1999, the Ferrys decided to refinance their home. They again asked defendant when their $50,000 would be released to them so they could pay off their second mortgage. Defendant again stated that the funds could not yet

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[2] The retainer agreement provided that defendant's fees would equal one-third of any recovery. As a result, the Ferrys were to receive $50,000 and defendant earned $25, 000 from the $75,000 settlement.

be released, claiming the absence of purportedly necessary tax releases. After a second inquiry relating to their proposed refinance, and after again being told that the settlement funds still could not be released due to absence of tax releases, the Ferrys abandoned their refinancing efforts. A few months later, in August 1999, Clark Ferry again contacted defendant and inquired as to the release of the $50,000 in settlement funds and was told that defendant planned to file a motion the following month for the release of the settlement funds.

Finally in October 1999, Barbara ferry contacted someone known to her who was on the staff of a New Jersey State Senator for assistance in determining what was delaying the release of the funds. It was a that point that Barbara Ferry realized that the settlement check had been issued payable to multiple payees: to Clark and Barbara Ferry, as administrators of their son's estate, and to defendant's law firm, as the attorneys for the decedent's estate. Barbara Ferry then secured a copy of the front and back of the cancelled $75,000 settlement check and for the first time became aware that it had been signed both on her behalf and her husband's behalf. Both the Ferrys testified that the signatures were not theirs and that they had not granted anyone authorization to sign on their behalf. Barbara Ferry then contacted defendant's office and was told that, at long last, the necessary released had been secured and that the funds should be in her hands by month's end.

The Ferrys' suspicions were aroused. They contacted the Westfield Police Department, the municipality where defendant's law offices were located, and were directed to the Union County Prosecutor's Office. The Appellate Division succinctly summarized the events that followed:

> On December 16, 1999, Mrs. Ferry called the defendant from the Westfield Police

> Department. A recording of the call was played for the jury. In the conversation, defendant tells Mrs. Ferry that he "finally got an Order signed by [a judge] that came in late November that gives the State 30 days" and that at "[t]he end of this month they should have to pay it." He told her that "they should give me something in writing that says there's no tax and . . . that's the final thing." He added that "[t]he Surrogate [was] waiting on the taxing authority to give them a tax clearance certificate" and that he "figure [d]" they should have it by "the end of the year." She should expect to hear from him"[p]robably [in] a couple [of] weeks." [State v. Mahoney, supra, 376 N.J. Super. at 77.]

Based on the information developed, the police secured a search warrant for defendant's law office and, on December 21, 1999, the police executed that search warrant and seized, among other things, defendant's file concerning the wrongful death action in respect of the Ferrys' son as well as the bank records of defendant's law firm.

At trial, the State presented the evidence outlined above. In addition, the State Presented the testimony of the chief clerk of the Ocean County Surrogate's Office, the insurance carrier's claims adjuster who handled this claim, and a detective of the Union County Prosecutor's Office. The Surrogate's clerk, who was offered to rebut the explanation defendant repeatedly gave the Ferrys for the delay in disbursing the settlement funds, explained the functions of the Surrogate's Office and made clear that when, as here, a check is made payable directly to the heirs of an estate and their counsel, no court approval is required in order to disburse the funds. In essence, this testimony rebutted defendant's earlier claim that the delay in

securing certain unidentified tax releases was the cause for the delay in transmitting the $50,000 in settlement funds to the Ferrys.[3]

The insurance carrier's claims adjuster testified that she had negotiated the final settlement with defendant by December 30, 1998. She also testified that she requested that defendant confirm that the Ferrys were in fact authorized to settle the estate of their dead son; that she received the relevant letters of administration from defendant on January 7, 1999, three days after they were issued; that she sent the insurance carrier's form of release to defendant; that the next day the insurance carrier received from defendant the release as purportedly executed by the Ferrys; that the $75,000 settlement check was issued and sent to defendant without delay; and the $75,000 settlement check was deposited on January 22, 1999 in what was ultimately identified as defendant's attorney trust account.

Finally, the detective testified as to the bank records seized as a result of the execution of the search warrant on defendant's law offices. According to the bank records, before the $75,000 settlement check was deposited in defendant's attorney trust account on January 20, 1999, defendant's attorney trust account had a balance of $250.19. Although an aggregate of $81,000 was deposited into that attorney trust account (the $75,000 settlement check on January 20, 1999 and another $6,000 deposit on January 21, 199), by the end of that month – just eleven days later - - the balance in defendants's attorney trust account was $1,905.19, entirely depleting the $50,000 in

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[3] Defendant never explained why the allegedly needed but missing tax releases did not delay the disbursement of his $25,000 fee from the $75,000 in settlement funds.

settlement monies due to the Ferrys.

Defendant testified. As summarized by the Appellate Division,

> [h]e claimed that Barbara Ferry knew that he received and deposited the settlement check, because she verbally authorized him to endorse it. He lied to the Ferrys as to the status of the settlement funds to deflect their inquires, thereby enabling him to concentrate on his treatment for prostate cancer. Although the cancer was not diagnosed until March 1999, based on his ill-health, he underwent an aggressive pre-diagnosis treatment regimen contemporaneous to the receipt of the settlement check.
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> Defendant acknowledged that [his law firm's] bank records, including those involving the trust account, were not maintained in proper accounting order. He attributed most of the problems to his poor health, commencing with a heart attack in 1997. His health and related emotional problems only worsened after the cancer was diagnosed. He had prostate surgery and follow-up radiation therapy. This rendered him temporarily incontinent, which, in turn, caused him to feel depressed and generally unconcerned with his business affairs.
>
> [Id. At 80.]

Defendant's testimony concerning the limitations on his ability

to practice law was corroborated by two health care professionals who had treated him - - a cardiologist and a psychologist.

Defendant's testimony did not go unchallenged. Among other things, the prosecutor cross-examined defendant in respect of his recordkeeping and attorney trust account obligations under Rule 1: 21-6, as well as his repeated failures to conform to the requirements of that Rule despite having practiced law for such a long period of time.

Defendant was convicted of one count of third-degree theft by failure to make required disposition of property, in violation of N.J.S.A. 2C:20-9; one count of third-degree misapplication of entrusted property, in violation of N.J.S.A. 2C:21-15; and two counts of fourth-degree forgery, in violation of N.J.S.A. 2C:21-1(a) (2). Defendant was sentenced to two concurrent three-year terms of probation and 500 hours of community service. He also was ordered to pay a $5,000 fine and the mandatory statutory penalties.

Defendant appealed. The Appellate Division reversed and remanded the matter for a new trial on three independent grounds: "based on the trial court's improper limitation of character witness testimony, inadequate jury instructions on the use of Rule 1:21-6, and the prosecutor's inappropriate remarks during summation." Id. at 98. Specifically, the panel faulted the trial court's refusal to allow defendant's character witnesses to testify about their personal experiences with defendant, defendant's skills as an attorney, and defendant's professional relationships with his clients and others. The panel also took issue with the prosecutor's argument that defendant's eventual payment of the monies due to the Ferrys did not excuse his conduct. In essence, the prosecutor drew analogies between defendant's "no-harm-no-foul" defense to shoplifters who are

caught as they are leaving the store and seek to avoid liability by returning the shoplifted items. Or to a burglar who is observed and, when the stolen object is discovered in the burglar's possession, returns the stolen object and claims that the only thing standing in the way of his returning the stolen object is "if the person had asked me enough times for [it] back I would have given it to them." According to the Appellate Division, "[b]y relying on factual scenarios completely unrelated to the crimes for which defendant was charged, the prosecutor's hypothetical scenarios improperly suggested to the jury that it was unnecessary for the State to prove at what point defendant's conduct became criminal." Id. at 85. Finally, the panel also faulted the trial court's handling of the prosecutor's use of Rule 1:21-6 as a standard of conduct in respect of defendant's recordkeeping and trust account activities.

The state sought certification and the defendant cross-petitioned for certification. We granted the State's petition, but denied that of defendant.[4] State v. Mahoney, 185 N.J. 35 (2005). For the reasons that follow, we affirm in part and reverse in part the judgment of the Appellate Division, and remand this cause of the Law Division for reinstatement of defendant's forgery convictions, and for a new trial in respect of those counts of the indictment charging defendant with theft by failure to make required disposition of property and misapplication of entrusted property.

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[4] Defendant sought certification on five separate questions. None "present[ed] a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court;" alleged a decisional conflict within the Appellate Division; "call[ed] for an exercise of the Supreme Court's supervision [;]" or otherwise presented a matter where "the interest of justice [so] requires." R. 2:12-4.

II.

A.

We address first the trial court's refusal to allow defendant to present character witnesses to testify either as to defendant's general character traits as an attorney or to specific instances of interactions with defendant, all for the purpose of demonstrating defendant's good character and lack of propensity to commit the acts for which he stood charged. On this point, the Appellate Division reversed, holding that "defendant was entitled to present testimonial evidence attesting to his skill and care as an attorney in order to rebut the State's contention that his failure to timely disburse clients' funds constituted the criminal offense of failing to make required disposition of property." State v. Mahoney, supra, 376 N.J. Super. At 72. We disagree.

Defendant tendered an aggregate of eight character witnesses.[5] At the trial court's request, defendant presented a proffer of the expected testimony of each of the proposed character witnesses. Relying on N.J.R.E. 404(a) (1), 405 and 406, defendant summarized the import of his proffered character witnesses as follows:

> A person's ability as an attorney is the central issue at trial here. It's not just he's an honest guy, but the reason I have a high opinion of him is he' an honest guy who is a good lawyer.

---

[5] Some of these character witnesses could have been fairly characterized as hybrid fact/character witnesses.

I think you can't just try or you just can't do it in a vacuum and say he's an honest lawyer that's why I have a good opinion of him. I have [a] good opinion of him because he's an honest lawyer and diligent lawyer. He goes the extra mile for me. He always puts himself out. I think that's a character trait that's in question here.

In its preliminary response to defendant's proffer, the trial court noted:

> It seems to me that the testimony is that, the testimony that I knew the defendant for, you know, X number of years in the following context, business context, social context; that I talked to people in the community who have dealings with him or I have a lot of dealings with him on a business level as a real estate person, as a client, as another lawyer, and based on my contacts with him or my speaking to people in the legal community or in the real estate community or the business community I have the following opinion of his trustworthiness and honesty or his reputation in the community for trust worthiness and honesty. I mean that's pretty straight forward stuff. I mean I think that's what you'd expect out of any character witness.
>
> . . . .
>
> The defense is proffering this as a character trait which is a little bit different that character evidence. I'm not sure that being a diligent lawyer is necessarily or being a diligent

> anything is a character trait that's relevant to what's going on here. . . .

The following day, after considering the submissions of counsel and hearing additional argument on the matter, the trial court ruled that "assuming there's a foundation laid, [defendant's character witnesses] can testify as to their opinion or the defendant's reputation in the community as to honesty, trustworthiness, integrity and diligence." After making clear the permitted scope of the testimony of defendant's character witnesses, the trial court set out the limitations placed on that testimony:

> I will preclude these character witnesses from testifying as to whether or not they were satisfied with the defendant as an attorney, their opinion of him as an attorney; that they would still be hiring him as a lawyer today; that they referred other clients to him; that he's handled millions of dollars for [a] particular client through trust accounts. I find those are not character traits, they are not pertinent, and they are specific instances of conduct and not opinion or reputation testimony.
>
> I will also add that from these character witnesses there will be no reference to the defendant's health, heart attack, cancer, fatigue, medication and no testimony regarding specific instances of conduct as prohibited by rule 405.

Defendant's character witnesses testified in compliance with the trial court's directives.

The Appellate Division found error in the limitations

placed on the scope of the testimony to be adduced from defendant's character witnesses. According to the panel,

> [u]nder N.J.R.E. 404(a) (1), defendant was entitled to present testimonial evidence attesting to his professional relationship with other clients. Such evidence directly relates to the crucial issue in this case, to wit, whether defendant's failure to turnover the settlement funds in a timely fashion is indicative of a criminal intent to perpetrate a theft, or of mere negligence brought about by sloppy recordkeeping and poor health.
>
> The court also erred when it excluded the testimony of witnesses' personal experiences with defendant that formed the basis for their opinions of his character. Without such a foundation, character testimony is reduced to a net opinion. In evaluating the value and legitimacy of the witnesses' opinion, the jury is entitled to consider the experiences that the witness and defendant have shared, and how they illuminate and reveal the content of a person's character.
>
> [Id. at 82-83.]

Whether proffered opinion or reputation evidence fits under the rubic of permissible character testimony is governed by N.J.R.E. 404, which, in relevant part, provides:

> (A) Character evidence generally. Evidence of a person's character or character trait, including a trait of care or skill or lack

thereof, is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion except:

(1) Character of accused. Evidence of a pertinent trait of the accused's character offered by the accused, which shall not be excluded under Rule 403, or by the prosecution to rebut the same;

. . .

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to whom that such person acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

(c) Character and character trait in issue. Evidence of a person's character or trait of character is admissible when that character or trait is an element of a claim or defense.[6]

N.J.R.E. 404 cannot be read in isolation; any analysis of the

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[6] The language of Evidence Rule 404 here cited differs in an immaterial respect from the language of the Rule extant at the time of defendant's trial in 2002. Effective July 1, 2005, paragraphs (a) and (b) of the Rule were amended to incorporate gender-neutral language; no substantive changes to the Rule were adopted.

propriety of character evidence is limited by the methods by which such proofs can be adduced. N.J.R.E. 405(a) explains that, in general, "[w]hen evidence of character or a trait of character of a person is admissible, it may be proved by evidence of reputation, evidence in the form of opinion, or evidence of conviction of a crime which tends to prove the trait". Because the character evidence proffered by defendant did not include evidence that defendant was convicted of any crime, defendant was limited offering character evidence of only two types: opinion or reputation evidence. Even if the evidence proffered is properly characterized as character evidence and is in the correct form of opinion or reputation evidence, that evidence nevertheless must be relevant as a prerequisite for admissibility. N.J.R.E. 402.

It has long been held in this State that

> [i]t is the right of a person charged with crime to have all the relevant testimony, including that relating to his good character or reputation, considered by the jury in every case, and if, on such consideration, there exists reasonable doubt of his guilt, even though that doubt be engendered merely by his previous good repute, he is entitled to an acquittal. . . . The principle above stated hold even in cases where the crime consists of a single misdeed, of which many a person of good reputation may be guilty; in

> cases like the present, where guilt implies the notorious practice of a vicious habit,[7] a general reputation of a contrary disposition seems to be direct evidence of innocence, and therefore entitled to the greater weight.
>
> [Baker v. State, 53 N.J.L. 45, 47 (Sup. Ct. 1890) (citations omitted).]

The passage of time has not diminished the import of Baker v. State. We are still governed by the principle that "[e]vidence of good character may be sufficient in itself to raise a doubt as to the guilt of the defendant, and it must be considered along with all the other evidence in the case and not restricted to situations where the other evidence itself raises a doubt." State v. Siciliano, 21 N.J. 249, 260-61 (1956).

Applying these principles, we conclude that the trial court correctly ruled that defendant's character witnesses could properly "testify as to their opinion or the defendant's reputation in the community as to honesty, trustworthiness, [and] integrity. . . " In respect of the additional matters defendant wished to elicit from these character witnesses - - testimony concerning defendant's military service, defendant's perceived skills as a lawyer - - we also conclude that the trial

---

[7] The defendant in Baker v. State was convicted of being a common scold, that is "[a] person who regularly breaks the peace by scolding people, increasing discord, and generally being a public nuisance to the neighborhood. This behavior was formerly punishable in various ways, including having an iron bridle fitted to the person's mouth." Black's Law Dictionary 1348 (7th ed. 1999).

court correctly barred that testimony because it was not relevant to the discrete issues in this case. Those issues are: did defendant engage in as act of theft by failing to make the required disposition of the settlement funds to the Ferrys, did defendant misapply the settlement funds that were entrusted to him, and did defendant forge the Ferrys' signatures on the settlement checks? Our rules bar not only impeachment of a witness through specific instances of conduct, but also evidence concerning how defendant acted in instances other than those at issue in the case because the alternative inevitably will result in "minitrials on collateral matters that tend to distract and confuse the jury[.]" State v. Guenther, 181 N.J. 129, 142 (2204) (citations and internal quotations marks omitted). Those considerations apply with equal force here and justify the limitations the trial court imposed on the scope of the testimony defendant sought to elicit from his character witnesses.

III.

A.

Defendant next complains that certain statements made by the prosecutor in her summation to the jury were so improper as to deny defendant a fair trial. The Appellate Division agreed and held that

> certain statements made by the prosecutor during summation were so egregious that they deprived defendant of his right to a fair trial. These involved a hypothetical scenario entirely unrelated to the crimes for which defendant was charged, and suggested that it was unnecessary for the State to prove at which point defendant's conduct became criminal.

[State v. Mahoney, supra, 376 N.J. Super. At 73]

We must, again, disagree with the panel's conclusions.

One of defendant's principal trial defenses was that because the Ferrys ultimately received the settlement funds that were due to them - - albeit over eleven months after he had deposited the settlement check in his escrow account, ten days after the police executed a search warrant on and seized his law firm's records, and although defendant himself conceded he repeatedly had lied to the Ferrys concerning his ability to disburse the settlement funds - - n o harm inured to anyone by his actions and, hence, he should escape liability for them. Responding to that defense, the prosecutor argued to the jury as follows:

> [THE PROSECUTOR]: And I would submit to you but for that search warrant, Mr. Mahoney would never have given the money or he'd have been putting them off and putting them off and putting them off for however long they would believe his lies because he only paid that back after the search warrant was executed. And again I would submit to you that the defense argument that they got their money therefore, he didn't have any criminal intent and he didn't commit a theft, that is ridiculous. I'll give you a whole bunch of examples.
>
> Somebody who is shoplifting at a store and gets caught by the security guard on the way out and then says well, I still have it inside my pocket. Here, you can have it back. So now I didn't commit a shoplifting. Or somebody goes

into a person's house and commits a burglary and takes an expensive piece of jewelry and witness sees who the person is and person gets away.

[DEFENSE COUNSEL]: Judge, I object.

THE COURT: Overruled.

[THE PROSECUTOR]: And then an arrest warrant is issued for that person and 11 months later the person is arrested, and then the person says oh, here's that watch. You can have it back now. I didn't commit the burglary. And there's no theft because I didn't have any intent. And, you know, if the person had asked me enough times for their watch back I would have give [sic] it to them.

The defendant through his own testimony seems to imply that the Ferrys had some responsibility to call him every day and ask for their money, and meanwhile he's lying to them.

[(emphasis supplied.)]

After marshalling the authority governing the limits of permissible argument by a prosecutor in summation, the Appellate Division implicitly accepted defendant's argument that, disregarding any events in the interim between defendant's receipt of the settlement funds and his eleventh-hour disbursement of those funds to the Ferrys, the fact that he ultimately paid the Ferrys the sums due to them raised the issue of whether a crime had been committed and, if so, when.

Specifically, the panel concluded that "[b]ecause defendant did, at one point, disburse the funds to the Ferrys, there was legitimate and critical threshold issue for the jury to decide; that is . Whether an actual crime had been committed." Id. at 84. Having so concluded, it was but a short step for the Appellate Division to reason that "at no point in the presentation of evidence or during summation did the prosecutor clarify for the jury the State's position as to when the crime was committed" and that "[w]ithout legal guidance in this area, the jury was left on its own to determine when the theft crime was completed by defendant." Ibid. The panel completed its analysis thusly:

> Determining that a prosecutor's summation exceeded the bounds of fair comment on the evidence is insufficient, in and of itself, to warrant reversal. We must also determine whether these comments were so prejudicial that they deprived defendant of his constitutional right to a fair trial. In making this determination, we must consider: (1) whether defense counsel interposed a timely objection to the remarks; (2) whether the remarks were withdrawn; and (3) whether the court ordered the remarks stricken and instructed the jury to ignore them.
>
> [Id. at 85 (citations omitted).]

The Appellate Division held that, because the trial court overruled defendant's objection to the challenged remarks, "the court missed the opportunity to mitigate the harm by issuing a properly tailored instruction directing the jury to disregard the prosecutor's statements" and that "[o]verrulling defendant's objection also communicated to the jury the court's tacit

endorsement of the prosecutor's incorrect expressions of the applicable law." Ibid.

The seminal role prosecutors play in our system of criminal justice bears repeating:

> [W]ithin the legal profession the prosecutor's double calling - to represent vigorously the state's interest in law enforcement and at the same time help assure that the accused is treated fairly and that justice is done - is uniquely challenging. The challenge is what makes the prosecutor's mission such a difficult one and such an honorable one. A prosecutor willing to engage in proscribed conduct to obtain a conviction . . . betrays his oath in both its respects. Not only does he scoff at rather than seek justice, he also represents the state poorly.
>
> [State v. Ramseur, 106 N.J. 123, 323-24 (1987), cert. denied, 508 U.S. 947, 113 S. Ct. 2433, 124 L. Ed. 2d 653 (1993).]

A determination whether a prosecutor has acted within that special role is informed by the standard under which a prosecutor's statements in summation are to be gauged: "Prosecutors are afforded considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented. Indeed, prosecutors in criminal cases are expected to make vigorous and forceful closing arguments to juries." State v. Frost, 158 N.J. 76, 82 (1999) (internal quotations and citations omitted). It is now well-settled that

> prosecutors should not make inaccurate legal or

> factual assertions during a trial and that they must confine their comments to evidence revealed during the trial and reasonable inferences to be drawn from that evidence. We have acknowledged that if a prosecutor's arguments are based on the facts of the case and reasonable inferences therefrom, what is said in discussing them, by way of comment, denunciation or appeal will afford no ground for reversal. However, we have not hesitated to reverse convictions where we have found that the prosecutor in his summation over-stepped the bound of propriety and created a real danger of prejudice to the accused.
>
> [State v. Smith, 167 N.J. 158, 178 (2001) (citations and internal quotation marks omitted).]

The prosecutor's comments were fairly "based on the facts of the case and reasonable inferences therefrom," were will within "the bounds of propriety[,]" and did not "create a real danger of prejudice to the accused." On the contrary, the prosecutor's comments legitimately placed an unforgiving and harsh glare on defendants's "no-harm-no-foul" defense. In light of the defense advanced by defendant, it was entirely proper for the prosecutor to point out that, once defendant had completed the crimes for which he stood charged, returning the funds he stole does not negate an element of the offenses charged, although it may be a mitigating factor at sentencing.

IV.

Because the operative facts in this case arose from defendant's failure to maintain sufficient funds in his trust

account in order to pay the Ferrys the monies due to them in a timely manner, a significant portion of the controversy in respect of those counts of the indictment charging defendant with theft by failure to make required disposition of property and misapplication of entrusted property revolved around defendant's compliance with R. 1:21-6. That Rule outlines in detail the recordkeeping, trust and business bank account format and location, and disclosure obligations imposed on all lawyers who practice in this State. In her cross-examination of defendant, the prosecutor made use of the requirements of R. 1:21-6 and defendant's admitted multiple failures to comply with its provision. Outside of the hearing of the jury at the close of all of the evidence, but before closing arguments or the court's charge to the jury, the prosecutor offered the text of the Rule as an exhibit in evidence. Defendant objected, claiming that the probative value of the text of R. 1:21-6 was outweighed by its claimed unduly prejudicial effect. The trial court remarked on the Rule's use in defendant's cross-examination, ruled that it was relevant, and determined that the balancing of its probative value against any undue prejudice required under N.J.R.E. 403 tipped in favor of its admissibility. Having done so, the trial court, immediately upon the jury's return to the courtroom, instructed the jury as follows:

> There are a couple of additional things that are [going to] be in evidence that I just want to mention to you. There's exhibits D-41 and D-42 and S-125. And what they are is D-41 and 42 are the New Jersey statutes that deal with refunding bonds and letters of administration that you heard about. So that if you wish to look at these New Jersey laws while you're deliberating you will have them.
>
> S-125 is a New Jersey court rule

> regarding records, keeping of attorney trust fund and what kind of records you have to keep and how you have to keep them. You also heard testimony about them. So if you wish during your deliberations to refer to that or read it, that will be in evidence also. And you'll have that in with your packet of exhibits.

Shortly after that instruction, both the prosecution and the defense delivered their closing statements to the jury.

In its charge to the jury the following trial day, the trial court made no reference to any limitations on the use the jury could make of R. 1:21-6 during its deliberations. The only reference made to the jury's use of this exhibit was oblique: the trial court instructed the jury that, in considering the elements of the offense of misapplication of entrusted property, "[h]aving insufficient funds in one's trust account to cover an attorney's obligation to his clients is not in and of itself a criminal violation. As mentioned above, in order to find the defendant guilty of this offense, the State must prove all of the above elements beyond a reasonable doubt."

The Appellate Division held that

> [t]he trial court correctly ruled that evidence showing defendant's failure to comply with the Rule's requirements was relevant to the jury's determination of guilt or innocence. The error here lies in the court's failure to limit the scope of the prosecutor's cross-examination of defendant. This error was compounded when the court permitted the jury to receive the entire text of this complex rule of accounting, without any instruction as to how it related to the issue

of defendant's criminal intent.

[State v. Mahoney, supra, 376 N.J. Super. At 86.]

Although the panel found fault with "the court's failure to limit the scope of the prosecutor's cross-examination of defendant" in respect of the prosecutor's use of R. 1:21-6, it did not explain or support that conclusion. A careful review of that cross-examination discloses, however, that it did not elicit a single objection from defendant concerning the use of R. 1:21-6 as a standard of conduct. Because we cannot find that the prosecutor's use of R. 1:21-6 was error clearly capable of producing an unjust result, we find no basis to support the panel's view that the scope of the prosecutor's cross-examination of defendant in respect of his R. 1:21-6 obligations should have been limited. To that extent, we dis avow the Appellate Division's holding that "[t]he error here lies in the court's failure to limit the scope of the prosecutor's cross-examination of defendant."

However, we are in accord wit the Appellate Division's later holding that the trial court's failure to instruct the jury on how to consider and apply R. 1:21-6 to the facts of this criminal case warrants the reversal of defendant's convictions for theft by failure to make required disposition of property and misapplication of entrusted property. In this respect, because the unexplained admission of a rule of attorney conduct carries the certain risk that the jury could conflate the Rule's requirements with those necessary for the imputation of criminal liability, we endorse the panel's analysis and commend it as the proper instruction to be given on remand:

> [I]t is the court's obligation to guide the jury in its search for the truth. Proper jury instructions

> in this area must begin by emphasizing that the State bears the burden of proving defendant guilty beyond a reasonable doubt as to each and every element of the crime. This burden is not diminished or transferred to defendant because he may have committed an ethical violation. The jury must be told that the [recordkeeping and] accounting practices delineated in the Rule are relevant to determining defendant's state of mind, because they placed defendant on notice as to what was expected of him when he became the custodian of client funds. But, that is not the end of the jury's inquiry.
>
> A violation of the Rule's requirements, in and of itself, is insufficient, as a matter of law, to sustain a finding of criminal culpability. However, together with any other evidence in the case, a jury may consider a violation of the Rule's requirements as evidence of defendant's purposeful conduct. The more egregious the violation, the greater its probative value is in assisting the jury in this determination. An extended pattern of conduct, displaying an utter disregard for the Rule's requirements, would have more probative value than an isolated incident of bad [recordkeeping or] accounting.
>
> [State v. Mahoney, supra, 376 N.J. Super, at 92]

The Appellate Division's judgment that "the trial court improperly excluded substantial portions of proffered testimony by defendant's character witnesses" is reversed, and we hold that the trial court's limitation on the testimony of defendant's proffered character witnesses, prohibiting any testimony either

as to specific interactions with defendant or defendant's skills as a lawyer, was proper. The Appellate Division's judgment that "certain statements made by the prosecutor during summation were so egregious that they deprived defendant of his right to a fair trial" also is reversed and we hold, instead, that the complained-of closing argument statements by the prosecutor did not deny defendant a fair trial. The Appellate Division's holding that the trial court erred in failing to limit the scope of the prosecutor's cross-examination of defendant in respect of defendant's recordkeeping and trust account obligations pursuant to R. 1:21-6 is also reversed. However, we affirm the Appellate Division's judgment that the trial court "improperly submitted to the jury the full text of Rule 1:21-6. . . . [due to] the court's failure to provide instructions to the jury on how to consider and apply the Rule's directives to the facts of this criminal case."

The judgment of the Appellate Division is affirmed in part and reversed in part, defendant's forgery convictions are reinstated, and the matter is remanded to the Law Division for further proceedings consistent with this opinion in respect of those counts of the indictment charging defendant with theft by failure to make required disposition of property and misapplication of entrusted property.

CHIEF JUSTICE PORITZ and JUSTICES LaVECCHIA, ZAZZALI, ALBIN, and WALLACE join in JUSTICE RIVERA-SOTO's OPINION. JUSTICE LONG did not participate.

SUPREME COURT OF NEW JERSEY

NO. A-10 SEPTEMBER TERM 2005

ON CERTIFICATION TO Appellate Division, Superior Court

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

ANTHONY M. MAHONEY,

Defendant-Respondent.

DECIDED April 19, 2006 - Refiled May 30, 2006
Chief Justice Poritz PRESIDING
OPINION BY Justice Rivera-Soto
CONCURRING/DISSENTING OPINIONS BY
DISSENTING OPINION BY

CHECKLIST	AFFIRM IN PART/REVERSE IN PART/REMAND	
CHIEF JUSTICE PORITZ	X	
JUSTICE LONG	----------	----------
JUSTICE LaVECCHIA	X	
JUSTICE ZAZZALI	X	
JUSTICE ALBIN	X	
JUSTICE WALLACE	X	
JUSTICE RIVERA-SOTO	X	
TOTALS	6	

APPENDIX B-
SUPREME COURT OF NEW JERSEY

Steven W. Townsend
Clerk

Office of the Clerk
PO Box 970
Trenton, NJ 08625-0970

Gail Grunditz Haney
Deputy Clerk

DATE: May 30, 2006
TO: Hon. Walter R. Barisonex, A.J.S.C.
FROM: Stephen W. Townsend, Esq.
RE: A-10-05 State v. Anthony M. Mahoney (00-12-1618)

I enclosed a red-lined copy of the Supreme Court decision in the above matter, which has been refiled. For your information you can find a clean copy of this opinion on the Judiciary's website.

Thank you.

S/_____
Stephen Townsend

Enclosure:
cc: Hon. Stuart Peim, J.S.C
Michael J. Williams, D.A.G.
Dennis M. Mahoney, Esq.
Jeffrey S. Mandel, Esq.
TCA Elizabeth Domigo (2 copies)

Revised File - 5/23/06
Supreme Court of New Jersey
A-10 September Term 2005

STATE OF NEW JERSEY
Plaintiff-Appellant,

v.

ANTHONY M. MAHONEY,
Defendant-Respondent.

Argued January 31, 2006- Decided April 19, 2006

On certification to the Superior Court, Appellate Division, whose opinion is reported at 376 N.J. Super 63 (2005)

Michael J. Williams, Depute Attorney General, argued the cause for appellant (Zulima v. Farber, Attorney General of New Jersey, attorney)

Jeffrey S. Mandel, argued the cause for amicus curiae, Association of Criminal Defense Lawyers of New Jersey (Pitney Hardin, attorneys).

JUSTICE RIVERA-SOTO delivered the opinion of the Court.

Defendant Anthony Mahoney, practicing attorney at law in this State, was convicted by a jury of stealing client funds entrusted to him. The jury determined that defendant committed a series of crimes by delaying the disbursement of funds owed to his clients, and by forging endorsements on a settlement check and depositing it without authoritation. On defendant's appeal, the Appellate Division reversed, holding that "the trial

court improperly excluded substantial portions of proffered testimony by defendant's character witnesses[;]" that "[t]he trial court also improperly submitted to the jury the full text of Rule U 1:21-6. . . [and failed] to provide instructions to the jury on how to consider and apply the Rule's directives to the facts of this criminal case[;]" and that "certain statements made by the prosecutor during summation were so egregious that they deprived defendant of his right to a fair trial.: State v. Mahoney, 376 N.J. Super. 63, 72-73 (App. Div. 2005)_

We disagree with two of the three conclusions advanced by the Appellate Division. We hold that the trial court's limitation on the testimony of defendant's proffered character witnesses, prohibiting any testimony either as to specific interactions with defendant or defendant's skills as a lawyer was proper. We also hold that the complained-of closing argument statements by the prosecutor did not deny defendant a fair trial. However, we do agree with the Appellate Division that the submission to the jury of the plain text of R. 1:21-6 – a rule of court that details an attorney's recordkeeping and trust fund accounting requirements – without appropriate guidance from the court was error. Therefore, we affirm in part and reverse in part the judgment of the Appellate Division, **reinstate defendant's third-degree forgery convictions and remand for a**

new trial on the remaining counts of the indictment charging defendant with third degree theft by failure to make required disposition of property and third-degree misapplication of entrusted property.

I.

As of the time relevant to this appeal, defendant had been licensed as an attorney at law in the State of New Jersey for almost twenty-eight years, the greater part of which was spent in partnership with his brother, who also is an attorney at law. Although defendant's practice included some transactional work, defendant focused almost exclusively on litigation matters. It was as part of his litigation practice that defendant was engaged to represent Clark and Barbary Ferry in connection with the wrongful death of their twenty-one year old son, Clark, Jr., who was struck and killed by a car in February 1998 as he was crossing the road late at night. [1] Later that spring, when the insurance carrier for the driver of the car who struck their son sought to contact the Ferrys, they asked defendant to handle the matter for them.

In December 1998, after some initial contacts between defendant and the insurance carrier, defendant sent a retainer

---

[1] This was not the first time defendant has been retained to represent the Ferrys. As the Appellate Division noted, the Ferrys were childhood friends of Defendant's secretary and defendant represented members of the Ferry family three separate times since the mid 1980's, the most recently the successful

(2005). For the reasons that follow, we affirm in part and reverse in part the judgment of the Appellate Division, and remand this cause to the Law Division for **reinstatement of defendant's forgery convictions, and for a new trial in respect of those counts of the indictment charging defendant with theft by failure to make required disposition of property and misapplication of entrusted property.**

II.

We address first the trial court's refusal to allow defendant to present character witnesses to testify either as to defendant's general character traits as an attorney or to specific instances of interactions with defendant, all for the purpose of demonstrating defendant's good character and lack of propensity to commit the acts for which he stood charged. On this point, the Appellate Division reversed, holding that "defendant was entitled to present testimonial evidence attesting to his skill and care as an attorney in order to rebut the state's contention that his failure to timely disburse clients' funds constituted the criminal offense of failing to make required disposition of property." State v. Mahoney, supra, 376 N.J. Super. at 72. We disagree

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Division; "call[ed]; for an exercise of the Supreme Court's supervision [;]" or otherwise presented a matter where "the interest of justice [so] requires" R. 2:12–4.

prejudice to the accused." On the contrary, the prosecutor's comments legitimately placed an unforgiving and harsh glare on defendant's "no-harm-no-foul" defense. In light of the defense advanced by defendant, it was entirely proper for the prosecutor to point out that, once defendant had completed the crimes for which he stood charged, returning the funds he stole does not negate an element of the offenses charged, although it may be a mitigating factor at sentencing.

IV.

Because the operative facts in this case arose from defendant's failure to maintain sufficient funds in his trust account in order to pay the Ferrys the monies due to them in a timely manner, a significant portion of the controversy in **respect of those counts of the indictment charging defendant with theft by failure to make required disposition of property and misapplication of entrusted property charges** revolved around defendant's compliance with R. 1:21–6. That Rule outlines in detail the recordkeeping, trust and business bank account format and location, and disclosure obligations imposed on all lawyers who practice in this State. In her cross-examination of defendant, the prosecutor made us of the requirements of R. 1:21–6 and defendant's admitted multiple failures to comply with its provisions. Outside of the hearing of the jury at the close of all the evidence, but before closing arguments or the court's charge to the jury, the prosecutor offered the text of

panel's view that the scope of the prosecutor's cross-examination of defendant in respect of his R.1:21–6 obligations should have been limited. To that extent, we disavow the Appellate Division's holding that "[t]he error here lies in the court's failure to limit the scope of the prosecutor's cross-examination of defendant."

However, we are in accord with the Appellate Division's later holding that the trial court's failrue to instruct the jury on how to consider and apply R.1:21–6 to the facts of this criminal case warrants the reversal of defendant's convictions **for theft by failure to make require disposition of property and misapplication of entrusted property.** In this respect, because the unexplained admission of a rule of attorney conduct carries the certain risk that the jury could conflate the Rule's requirements with those necessary for the imputation of criminal liability, we endorse the panel's analysis and commend it as the proper instruction to be given on remand:

> [I]t is the court's obligation to guide the jury in its search for the truth. Proper jury instructions in this area must begin by emphasizing that the State bears the burden of proving defendant guilty beyond a reasonable doubt as to each and every element of the crime. This burden is not diminished or transferred to defendant because he may have committed an ethical violation. the jury must be told that the [recordkeeping and] accounting practices delineated in the Rule are relevant to determining defendant's state of mind, because they placed defendant on notice as to what was expected of him when he became the custodian of client funds.
>
> [page 27]

failure to provide instructions to the jury on how to consider and apply the Rule's directives to the facts of this criminal case."

The judgment of the Appellate Division is affirmed in part and reversed in part, **defendant's forgery convictions are reinstated,** and the matter is remanded to the Law Division for further proceeding consistent with this opinion **in respect of those counts of the indictment charging defendant with theft by failure to make required disposition of property and misapplication of entrusted property.**

CHIEF JUSTICE PORITZ and JUSTICES LaVECCHIA, ZAZZALI, ALBIN, and WALLACE join in JUSTICE RIVERA-SOTO's opinion. JUSTICE LONG did not participate.

[Page 29]

APPENDIX - C

OPINION OF THE NEW JERSEY SUPREME COURT DATED APRIL 19, 2006 AT PAGES 2, 3, 11, 24, 27 AND 29.

SUPREME COURT OF NEW JERSEY

Stephen W. Townsend
Clerk

Office of the Clerk
P.O. Box 970
Trenton, New Jersey 08625-0970

Gail Grunditz Haney
Deputy Clerk

DATE: April 19, 2006

TO: Hon. Walter R. Barisonek, A.J.S.C.

FROM: Stephen W. Townsend, Esq.

RE: A-10-05 State v. Anthony M. Mahoney (00-12-01618)

I enclose a copy of the Supreme Court decision in the above matter, which has been filed. Please take whatever action is appropriate in light of the Court's ruling.

Thank you.

s/

SWT/pgs

Enclosure

cc: Hon. Stuart Peim, J.S.C.
Michael J. Williams, D.A.G.

Dennis M. Mahoney, Esq.
Jeffrey S. Mandel, Esq.
TCA Elizabeth Domingo (2 copies)

SUPREME COURT OF NEW JERSEY
A-10 September Term 2005

STATE OF NEW JERSEY

Plaintiff-Appellant,

v.

ANTHONY M. MAHONEY,

Defendant-Respondent.

Argued January 31, 20063 - Decided April 19, 2006

On certification to the Superior Court, Appellate Division, whose opinion is reported at 376 N.J. Super., 63 (2005).

Michael J. Williams, Deputy Attorney General, argued the cause for appellant (Zulima V. Farber, Attorney General of New Jersey, attorney).

Dennis M. Mahoney argued the cause for respondent (Mr. Mahoney and John Morelli, attorneys; Mr. Mahoney and Mr. Morelli, on the briefs).

Jeffrey S. Mandel argued the cause for amicus curiae, Association of Criminal Defense Lawyers of New Jersey (Pitney Hardin, attorneys).

JUSTICE RIVERA-SOTO delivered the opinion of the Court.

Defendant Anthony Mahoney, a practicing attorney at law in this State, was convicted by a jury of stealing client funds entrusted to him. The jury determined that defendant committed a series of crimes by delaying the disbursement of funds owed to his clients, and by forging endorsements on a settlement check

and depositing it without authorization. On defendant's appeal, the Appellate Division reversed, holding that "the trial court improperly excluded substantial portions of proffered testimony by defendant's character witnesses[;]" that "[t]he trial court also improperly submitted to the jury the full text of Rule 1:21-6. . . . [and failed] to provide instructions to the jury on how to consider and apply the Rule's directives to the facts of this criminal case[;]" and that "certain statements made by the prosecutor during summation were so egregious that they deprived defendant of his right to a fair trial." State v. Mahoney, 376 N.J. Super. 63, 72-73 (App. Div. 2005).

We disagree with two of the three conclusions advanced by the Appellate Division. We hold that the trial court's limitation on the testimony of defendant's proffered character witnesses, prohibiting any testimony either as to specific interactions with defendant or defendant's skills as a lawyer, was proper. We also hold that the complained-of closing argument statements by the prosecutor did not deny defendant a fair trial. However we do agree with the Appellate Division that the submission to the jury of the plain text of R. 1:21-6--a rule of court that details an attorney's recordkeeping and trust fund accounting requirements - - without appropriate guidance from the court was error. Therefore, we affirm in part and reverse in part the judgment of the Appellate Division

I.

As of the time relevant to this appeal, defendant had been licensed as an attorney at law in the State of New Jersey for almost twenty-eight years, the greater part of which was spent in partnership with this brother, who also is an attorney at law. Although defendant's practice included some transactional work, defendant focused almost exclusively on litigation matters. It was as part of his litigation practice that defendant was engaged to represent Clark and Barbara Ferry in connection with the wrongful death of their twenty-one year old son, Clark Jr., who was struck and killed by a car in February 1998 as he was crossing a road late at night.[1] Later that spring, when the insurance carrier for the driver of the car who struck their son sought to contact the Ferrys, they asked defendant to handle the matter for them.

In December 1998, after some initial contacts between defendant and the insurance carrier, defendant sent a retainer agreement to Barbara Ferry. After reaching agreement on the terms of defendant's retention and compensation, Mrs. Ferry signed the retainer agreement as administratrix ad proseguendum of her deceased son's estate. The execution of the retainer agreement was followed by a January 4, 1999 meeting at the Ocean

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[1] This was not the first time defendant had been retained to represent the Ferrys. As the Appellate Division noted, the Ferrys were childhood friends of defendant's secretary and defendant had represented members of the Ferry family three separate times since the mid-1980's, most recently the successful criminal defense of their son Clark Jr. in 1997. State v. Mahoney, supra, 376 N.J. Super. at 74.

the only thing standing in the way of his returning the stolen object is "if the person had asked me enough times for [it] back I would have given it to them." According to the Appellate Division, "[b]y relying on factual scenarios completely unrelated to the crimes for which defendant was charged, the prosecutor's hypothetical scenarios improperly suggested to the jury that it was unnecessary for the State to prove at what point defendant's conduct became criminal." Id. at 85. Finally, the panel also faulted the trial court's handling of the prosecutor's use of Rule 1:21-6 as a standard of conduct in respect of defendant's recordkeeping and trust account activities.

The State sought certification and the defendant cross-petitioned for certification. We granted the State's petition, but denied that of defendant.[4] State v. Mahoney, 185 N.J. 35 (2005). For the reasons that follow, we affirm in part and reverse in part the judgment of the Appellate Division and remand this cause to the Law Division.

[4] Defendant sought certification on five separate questions. None "present[ed] a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court;" alleged a decisional conflict within the Appellate Division; "call[ed] for an exercise of the Supreme Court's supervision[;]" or otherwise presented a matter where "the interest of justice [so] requires." R. 2:12-4

negate an element of the offenses charged, although it may be a mitigating factor at sentencing.

IV.

Because the operative facts in this case arose form defendant's failure to maintain sufficient funds in his trust account in order to pay the Ferrys the monies due to them in a timely manner, significant portion of the controversy revolved around defendant's compliance with R. 1:21-6. That Rule outlines in detail the recordkeeping, trust and business bank account format and location, and disclosure obligations imposed on all lawyers who practice in this State. In her cross-examination of defendant, the prosecutor made use of the requirements of R. 1:21-6 and defendant's admitted multiple failures to comply with its provisions. Outside of the hearing of the jury at the close of all of the evidence, but before closing arguments or the court's charge to the jury, the prosecutor offered the text of the Rule as an exhibit in evidence. Defendant objected, claiming that the probative value of the text of R. 1:21-6 was outweighed by its claimed unduly prejudicial effect. The trial court remarked on the Rule's use in defendant's cross-examination, ruled that it was relevant, and determined that the balancing of its probative value against any undue prejudice required under N.J.R.E. 403 tipped in favor of its admissibility. Having done so, the trial court, immediately

However, we are in accord wit the Appellate Division's later holding that the rial court's failure to instruct the jury on how to consider and apply R. 1:21-6 to the facts of this criminal case warrants the reversal of defendant's conviction. In this respect, because the unexplained admission of a rule of attorney conduct carries the certain risk that the jury could conflate the Rule's requirements wit those necessary for the imputation of criminal liability, we endorse the panel's analysis and command it as the proper instruction to be given on remand:

[I]t is the court's obligation to guide the jury in its search for the truth. Proper jury instructions in this area must begin by emphasizing that State bears must begin by of proving defendant guilty beyond a reasonable doubt as to each and every element of the crime. This burden is not diminished or transferred to defendant because he may have committed an ethical violation. The jury must be told that the [recordkeeping and] accounting practices delineated in the Rule are relevant to determining defendant's state of min, because they placed defendant on noti8ce as to what was expected of him when he became the custodian of client funds. But, that is not the end of the jury's inquiry.

A violation of Rule's requirements, in and of itself, is insufficient, as a matter of law, to sustain a finding of criminal culpability. However, together with any other evidence in the case, a jury may consider a violation of the Rule's requirements as evidence of defendant's purposeful conduct. The more egregious the violation, the greater its probative value is in assisting the jury in this determination. An extended pattern of conduct, displaying an utter disregard for the Rule's requirements, would have more probative value than an

The judgment of the Appellate Division is affirmed in part and reversed in part, and the matter is remanded to the Law Division for further proceedings consistent with this opinion.

CHIEF JUSTICE PORITZ and JUSTICES LaVECCHIA, ZAZZALI, ALBIN, and WALLACE join in JUSTICE RIVERA-SOTO's opinion. JUSTICE LONG did not participate.

APPENDIX - D

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3364-02T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANTHONY MAHONEY,

Defendant-Appellant.

Argued January 25, 2005 - Decided March 17, 2005

Before Judges Kestin, Lefelt and Fuentes.

On appeal from Superior Court of New Jersey, Law Division, Union County, Docket No. 12-01618.

Dennis M. Mahoney and John Morelli argued the cause for appellant (Dennis M. Mahoney, attorney; Mr. Mahoney on the brief).

Michael J. Williams, Deputy Attorney General, argued the cause for respondent (Peter C. Harvey, Attorney General, attorney; Mr. Williams, of counsel and on the brief).

The opinion of the court was delivered by FUENTES, J.A.D.

Defendant, Anthony Mahoney, was tried before a jury and convicted of third-degree theft by failure to make required disposition of property, N.J.S.A. 2C:20-9; third-degree misapplication of entrusted property, N.J.S.A. 2C:21-15; and two counts of third-degree forgery, N.J.S.A. 2C:21-1(a)(2). He was sentenced to an aggregate three-year term of probation, conditioned upon performing 500 hours of community service. The court also levied a $5,000 fine and ordered him to pay the mandatory statutory penalties. Defendant now appeals raising the following arguments:

POINT ONE

DENIAL OF PTI WAS A PATENT AND GROSS ABUSE OF DISCRETION AND A CLEAR ERROR OF JUDGMENT.

POINT TWO

THE VERDICTS BELOW WERE FACTUALLY INCONSISTENT.

POINT THREE

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ITS RULINGS ON CHARACTER TESTIMONY.

POINT FOUR

THE TRIAL COURT ERRED IN REFUSING TO DISMISS COUNTS I AND II OF THE INDICTMENT.

A. Dismissal of 2C:20-9 For Failure to

Present a Prima Facie Case

B. Dismissal of 2C:21-15 as Being Factually Duplicative of The Charge Under 2C:20-9 and Therefore a Denial of Due Process

POINT FIVE

THE TRIAL COURT'S EVIDENTIARY RULINGS, EITHER INDIVIDUALLY OR COLLECTIVELY, SO PREJUDICED THE DEFENSE AS TO CONSTITUTE A DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

A. Inadmissibility of Rule 1:21-6

B. Alleged Financial Condition As Proof of Motive

C. Admissibility of the Sworn Statements of Clark and Barbara Ferry

D. Medical Evidence - Letter from Dr. Dattoli to Judge Mahon

E. Trial Court's Abuse of Discretion in Rulings on Infidelity and Illegitimacy

F. Evidentiary Rulings Blocking Admissibility of Aggravated Sexual Assault Charge and Documentary Blood Alcohol Readings of C.J. Ferry

POINT VI

THE JUDGMENT ENTERED BELOW SHOULD BE REVERSED DUE TO PROSECUTORIAL MISCONDUCT.

A. Before The Grand Jury

B. Summation at Trial

POINT VII

THE FORGERY VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE.

Defendant is an attorney.[1] The conviction for theft was based on defendant's delay in disbursing to his clients proceeds from a settlement of a wrongful death case. With respect to the forgery conviction, the State presented evidence that defendant endorsed and deposited the three-party settlement check without his clients' authorization.

The prosecutor denied defendant's application to enter Pre-Trial Intervention (PTI) and, on appeal from the prosecutor's denial, the trial court affirmed. The prosecutor premised his denial on the nature of the conduct allegedly engaged in by defendant. Relying on PTI Guideline 3(i), as codified in Rule 3:28, the prosecutor concluded that, as a

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[1] Defendant was temporarily suspended from the practice of law on March 16, 2000. The record does not indicate whether the suspension remains in effect.

licensed attorney, defendant was presumptively ineligible to participate in PTI because he was charged with committing crimes that involved a breach of the public trust. Accordingly, defendant had failed to overcome the presumption against admitting individuals charged with these type offenses.

After reviewing the record and in light of prevailing legal standards, we reverse the convictions. We conclude that the trial court improperly excluded substantial portions of proffered testimony by defendant's character witnesses. The court erroneously prevented these witnesses from testifying about defendant's character traits as an attorney, and improperly barred them from testifying about the specific experiences they had had with defendant that formed the basis for their opinions. We hold that defendant was entitled to present testimonial evidence attesting to his skill and care as an attorney in order to rebut the State's contention that his failure to timely disburse clients' funds constituted the criminal offense of failing to make required disposition of property.

The trial court also improperly submitted to the jury the full text of Rule 1:21-6. This Rule sets forth an attorney's bookkeeping responsibilities related to the practice of law, with respect to both the attorney's business records and to records of client funds entrusted to the lawyer for a particular purpose. The error here involved the court's failure to provide instructions to the jury on how to consider and apply the Rule's directives to the facts of this criminal case. Without judicial guidance, a criminal jury may mistakenly regard the Rule's requirement as an element of the criminal offense of failing to make the required disposition or misapplication of entrusted property.

We further conclude that certain statements made by

the prosecutor during summation were so egregious that they deprived defendant of his right to a fair trial. These involved a hypothetical scenario entirely unrelated to the crimes for which defendant was charged, and suggested that it was unnecessary for the State to prove at which point defendant's conduct became criminal.

We affirm, however, the trial court's denial of defendant's PTI application. We hold that defendant failed to show that the prosecutor's rejection amounted to a gross abuse of discretion or was otherwise arbitrary or capricious.

In light of these determinations, we decline to consider the balance of defendant's arguments. Our factual recitation will thus be limited to the facts necessary to address the pertinent legal issues previously identified.

I

Defendant began practicing law in 1971. His first job as a lawyer was at the office of the Bronx District Attorney. He was admitted to the New Jersey bar in 1972. He and a partner opened a law firm in Cranford in 1974. Thereafter, he formed a partnership with his brother in Westfield, where he continued to work as of the time of trial. Defendant's practice primarily focused on litigation, but he also performed transactional work.He became a certified civil trial attorney when the program was inaugurated in New Jersey.

Barbara and Clark Ferry had been friends with defendant's secretary, Maureen Holohan, since childhood. The Ferrys first contacted defendant in the mid-1980s when they discovered that their six-year-old son, Richard, had been born with an eye problem. No lawsuit was filed in that case. In 1993, the Ferrys contacted defendant after their

daughter, Desiree, died of injuries sustained in a one-car accident. After considerable discovery, that case was withdrawn several years later because defendant was unable to find a medical expert to opine that the hospital or any of the treating physicians were civilly liable for the child's death. In 1997, defendant successfully defended the Ferrys' son, Clark (known as "CJ"), when he was arrested on an indictable criminal charge. Defendant never charged the Ferrys for his services on these cases.

In February 1998, twenty-one-year-old CJ was killed by a car as he attempted to cross Route 9 in Monmouth County at 2:00 a.m., after drinking with friends at a nearby club. The following spring, the Ferrys received several telephone messages from the driver's insurance company, Harleysville Insurance. Mrs. Ferry asked defendant to contact the insurance company "and find out what they wanted."

According to the Ferrys, defendant contacted the insurance company and began to negotiate a settlement. The Ferrys discussed the progress of the settlement negotiations with defendant on the telephone on "more than one occasion" during the fall of 1998. Thereafter, defendant informed Mrs. Ferry that the insurance company wanted to settle the claim to avoid any future lawsuit.

In December 1998, defendant sent Mrs. Ferry a contingency fee retainer agreement. Several changes were made to the agreement as a result of telephone discussions she had with defendant. Mrs. Ferry alone signed the agreement as administratrix ad prosequendum of the estate of Clark Ferry. The agreement provided for defendant to receive, by way of compensation, thirty-three percent of any monetary settlement.

At defendant's request, the Ferrys met him on January 4, 1999, at the surrogate's office located at the Ocean County Courthouse. Both Mr. and Mrs. Ferry signed an application for administration ad prosequendum. Mrs. Ferry testified that she did not understand the purpose of the application. She also testified that she signed "a lot of papers" that day without knowing what she signed.

According to Mrs. Ferry, the first time she saw a document that the prosecutor called "a release" was during defendant's trial. She testified, however, that the signatures on the document belonged to her and her husband. On cross-examination, she was shown a release dated January 1999. She surmised that she must have signed the document during her visit to the surrogate's office on January 4, 1999. She also indicated that the signatures on a document dated January 7, 1999, which the prosecutor referred to as a "general release," were not the signatures of her or her husband. Although she never heard the term "refunding bond" and could not recall signing one, she identified her and her husband's signatures on a partial refunding bond sent to them by defendant on April 15, 1999. Mr. Ferry also identified his signature on the release, but was unable to recall signing the documents. He said defendant explained "some things" about the documents, but that he "didn't really attach any significance to them."

On or about January 12, 1999, the Ferrys received the following letter from claims representative Rachel Brown:

> In accordance with N.J.A.C. 11:2-17.11, Unfair Claims Practices, we are required to notify you of settlement of your third party liability claim with your legal representative.
>
> We are required by the above act to provide

you with the following information.

1. The amount of payment: $75,000

2. The party/parties to whom the check was made payable: Clark Ferry & Barbara Ferry, as Administrators Ad Prosequedum [sic] for Estate of Clark Ferry, Jr. and Mahoney & Mahoney, as attorneys.

3. The party to whom the check was mailed; Mahoney & Mahoney.

4. The address of the party to whom the check was mailed: P.O. Box 309, Westfield, NJ 07090

Instead of reading the letter herself, Mrs. Ferry testified that she left it for her husband to read. She never discussed the letter with her husband until the following October. She admitted, however, that on or about January or February 1999, defendant told her that he had deposited the settlement check in his account, and that the State would not release the funds for thirty days.

Mr. Ferry testified that he read the letter in January 1999, and discussed it with his wife. He told her to call defendant because, although he "originally" did not understand the letter, "it became clear to [him] as [he] discussed it with [Mrs. Ferry] . . . that it meant that there was a payment that was made." He also understood that the check had been deposited by defendant. Mrs. Ferry called defendant in March 1999, "to see if he had received the release from the State so that he could issue our portion of the check." Defendant told her he was still waiting for releases pertaining to "the New Jersey income tax."

In April 1999, Mr. Ferry was in the process of refinancing his mortgage. He called defendant to determine when the settlement funds would be released and whether he could use it to payoff his second mortgage. According to Mr. Ferry, defendant told him that it "would be a month to six weeks worth of time before the monies would be released." Three weeks before the expiration of his sixty-day mortgage commitment, Mr. Ferry again telephoned defendant's office inquiring about the availability of the settlement funds. He was told by the person who answered "that the monies had not been released yet." Mr. Ferry decided to cancel the refinancing.

In August 1999, Mr. Ferry again contacted defendant seeking information on the status of the settlement funds. According to Mr. Ferry, defendant told him that he was planning to file a motion, sometime in September, to have the settlement funds released because "no liens" had been found against his son. Defendant attributed the delay to unspecified matters related to CJ's estate.

In October 1999, Mrs. Ferry contacted an acquaintance who was on the staff of a State Senator, to obtain information on the New Jersey tax "that was holding up the settlement money." She gave this person a copy of the January 12, 1999 letter from the insurance company. Mrs. Ferry testified that, as a result, she discovered that the settlement check had been issued listing three people as payees.

When Mrs. Ferry obtained a copy of the front and back of the settlement check, she noticed that it contained the signatures of Clark B. Ferry, Barbara Ferry, and Mahoney and Mahoney, with the word "trust," and an account number. Both Mr. and Mrs. Ferry testified that these were not their signatures, and that they had not authorized anyone to

endorse the check on their behalf. When Mrs. Ferry contacted defendant's office, she was told that the money had finally been released and that she should receive her share by the end of the month.

At this point, the Ferrys contacted the Westfield Police Department, which directed them to the Union County Prosecutor. On December 16, 1999, Mrs. Ferry called defendant from the Westfield Police Department. A recording of the call was played for the jury. In the conversation, defendant tells Mrs. Ferry that he "finally got an Order signed by [a judge] that came in late November that gives the State 30 days" and that at "[t]he end of this month they should have to pay it." He told her that "they should give me something in writing that says there's no tax and . . . that's the final thing." He added that "[t]he Surrogate [was] waiting on the taxing authority to give them a tax clearance certificate" and that he "figure[d]" they should have it by "the end of the year." She should expect to hear from him "[p]robably [in] a couple weeks."

On December 21, 1999, the police executed a search of defendant's office and seized numerous documents including the Ferry file and bank records. Ten days later, Holohan delivered to the Ferrys a.$50,000 check dated December 31, 1999, payable to Clark and Barbara Ferry for the estate of Clark Ferry. The check was drawn on the Mahoney and Mahoney Partnership Attorney Trust Account.

II

In addition to the Ferrys, the State called Susan Walters, chief clerk of the Ocean County Surrogate's Office to explain the legal function of her office to the jury. Walters explained that letters of administration ad prosequendum are required to obtain the right to file a wrongful death suit on behalf of a decedent. Here, these documents were issued on

January 4, 1999, to Clark and Barbara Ferry.

According to Walters, the Ferrys needed judicial approval to dispose of any estate asset, "even in the form of a check." This procedure is only necessary, however, when the check is issued to "the estate of" decedent. Court approval is not required when, as here, the check is made payable directly to the heirs and their counsel.

Because the surrogate's office was never notified of any assets placed in CJ's estate, no inheritance tax would have been due from his parents. As to the need for bonding by the Ferrys, Walters explained that a partial refunding bond was only necessary when the heirs receive only part of their "benefits." In this scenario, a refunding bond protects the executor or administrator "if there's a just debt that comes about after [the heirs] receive their money."

The State also called Rachel Brown, the claims adjuster in charge of the Ferry matter. Brown received defendant's name from an investigator the carrier hired to locate CJ's family. She contacted defendant on August 4, 1998, and they exchanged correspondence throughout the fall. She characterized the case as "complex" because it involved a fatality and questionable liability by the insured. According to Brown, CJ may have been intoxicated, was wearing dark clothing, and had crossed the middle of Route 9 in the early hours of the morning.

On December 10, 1998, Brown offered defendant $50,000 to settle the case. On December 14, 1998, defendant made a demand for $75,000, which Brown agreed to on December 30, 1998. On that same day, she requested confirmation that the parents in fact were responsible for the estate. Defendant faxed copies of the relevant documents on January 7, 1999.

That same day, Brown forward to defendant a copy of the release. The next day, January 8, 1999, the insurance company received a letter from defendant transmitting an executed release showing the Ferrys' signatures. The settlement check was issued immediately thereafter, and cashed on January 22, 1999.

Detective Gagliardi of the Union County Prosecutor's Office testified regarding the bank records seized from defendant's office. The Mahoney and Mahoney partnership attorney trust account was held at Fleet Bank (referred throughout the trial as "the 116 account" or "the trust account"). The partnership's business account bore a different account number. Bank records for the trust and business accounts covered a period from January to November 1999.

A series of banking transactions document how the critical events unfolded. It is necessary to list these transactions chronologically in order to fully appreciate the State's theory of culpability:

> (1) On January 15, 1999, the 116 trust account had a balance of $250.19;
>
> (2) On January 20, 1999, a deposit was made in the amount of $75,000;
>
> (3) On January 21, 1999, a further deposit was made in the amount of $6,000;
>
> (4) On January 21, 1999, three separate checks were written from this account: (i) a check for $17,045.08, payable to a bank; (ii) a check for $17,954.92, payable to a

mortgage company; and (iii) a check for $15,000, payable to a mortgage corporation.

(5) On January 22, 1999, three more checks were written from the trust account: (i) a check for $6,000, payable to Mahoney and Mahoney law firm; (ii) a check for $18,827.08, payable to an individual; and (iii) a check for $4,517.92, payab'le to an individual.

(6) The account's ending balance for the month of January was $1,905.19.

Numerous checks were also written from the trust account to the firm's business account during the period from February to November 1999, as well as a $6,000 check issued to defendant. The partnership's business account had a beginning deficit balance in January 1999 of $596.79. After $17,492.74 was deposited into the account, the ending balance was $1,634.66. The bank sent five insufficient funds notices on the account in February, June and August 1999.

Defendant testified in his own defense. He claimed that Barbara Ferry knew that he received and deposited the settlement check, because she verbally authorized him to endorse it. He lied to the Ferrys as to the status of the settlement funds to deflect their inquiries, thereby enabling him to concentrate on his treatment for prostate cancer. Although the cancer was not diagnosed until March 1999, based on his ill-health, he underwent an aggressive pre-diagnosis treatment regimen contemporaneous to the receipt of the settlement check.

Defendant acknowledged that bank records,

including those involving the trust account, were not maintained in proper accounting order. He attributed most of the problems to his poor health, commencing with a heart attack in 1997. His health and related emotional problems only worsened after the cancer was diagnosed. He had prostate surgery and follow-up radiation therapy. This rendered him temporarily incontinent, which, in turn, caused him to feel depressed and generally unconcerned with his business affairs. Defendant also called two expert witnesses, a cardiologist and a psychologist, who had treated him at various points in his illness. These witnesses corroborated defendant's testimony with respect to his inability to fully attend to his business affairs.

In rebuttal, the prosecutor emphasized defendant's ethical responsibilities to maintain attorney trust account records in conformance with the requirements of Rule 1:21-6. She aggressively cross-examined defendant on the details of his derelictions vis-a-vis the Rule's requirements, and highlighted his thirty years of practicing law without ever having maintained his trust account ledger in compliance with the Rule's requirements.

III

A central part of the defense focused on defendant's lack of intent to permanently deprive the Ferrys of the settlement proceeds. He emphasized that he never paid himself the one-third contingency fee he was entitled to receive under the retainer agreement. In furtherance of this defense, defendant called a group of eight individuals, consisting of both colleagues and former clients, to provide character evidence testimony concerning his manner of practice and reputation as a lawyer.

Prior to these witnesses testifying before the jury, defense counsel proffered that each witness would testify about the details of his or her relationship with defendant and offer opinions on defendant's honesty, trustworthiness, diligence and ability as an attorney. For each of the eight potential witnesses, defense counsel indicated when the individual had met defendant and the circumstances of the relationship. By way of example, one potential attorney-witness had known defendant since 1972, was a former co-worker, referred cases to him, and worked jointly with him on cases. Another had known defendant since law school, served with him in Vietnam, and handled cases with him.

After hearing defense counsel's proffers, the trial court determined that the evidence defendant sought to introduce fell within N.J.R.E. 404(a)(l), regarding a "pertinent trait of the accused's character," and not within N.J.R.E. 404(c), which involves "a character or trait [that] is an element of a claim or defense." The court thus ruled that the witnesses could only testify "as to their opinion of the defendant's reputation in the community as to honesty, trustworthiness, integrity and diligence." They were precluded, however:

> from testifying as to whether or not they were satisfied with the defendant as an attorney, their opinion of him as an attorney; that they would still be hiring him as a lawyer today; that they referred other clients to him; that he's handled millions of dollars for particular clients through trust accounts.

The court excluded this area of potential testimony because, in its reading of the Rule, "those are not character traits, they are not pertinent, and they are specific instances of conduct and not opinion or reputation testimony."

The court thereafter conducted a series of N.J.R.E. 104 hearings in which the prospective character witnesses described, in great detail, their experiences with defendant. At the end of these hearings, the court ruled that each witness was restricted to testify only about general information concerning that witness's relationship with defendant.

Thus, the attorney who served in Vietnam with defendant was specifically precluded from mentioning that aspect of their relationship. The court directed defense counsel to use leading questions and "to tell your witnesses that they are not to blurt out anything about compassion, anything about quality of services, anything about anything other than their opinion regarding the trustworthiness, truthfulness and integrity" of defendant. Against this backdrop, we will now discuss the legal issues involved.

It is well settled that a defendant in a criminal trial has the right to present character evidence to address the principal question the jury must ultimately answer: has the State met its burden of proving guilt beyond a reasonable doubt. State v. Siciliano, 21 N.J. 249, 260-62 (1956); State in the Interest of V.M., 363 N.J. Super. 529, 537 (App. Div. 2003); State v. Micci, 46 N.J. Super. 454, 459-60 (App. Div. 1957); State v. Steensen, 35 N.J. Super. 103, 106 (App. Div. 1955). Because the right to present character evidence is embedded in the presumption of innocence, N.J.R.E. 404(a)(1) prohibits a court from excluding character evidence, under N.J.R.E. 403, offered by the accused.

Here, the trial court erred when it precluded testimony about defendant's traits of care as an attorney. Under N.J.R.E. 404(a)(1), defendant was entitled to present testimonial evidence attesting to his professional relationship with other clients. Such evidence directly relates to the

crucial issue in this case, to wit, whether defendant's failure to turnover the settlement funds in a timely fashion is indicative of a criminal intent to perpetrate a theft, or of mere negligence brought about by sloppy recordkeeping and poor health.

The court also erred when it excluded the testimony of witnesses' personal experiences with defendant that formed the basis for their opinions of his character. Without such a foundation, character testimony is reduced to a net opinion. In evaluating the value and legitimacy of the witnesses' opinion, the jury is entitled to consider the experiences that the witness and defendant have shared, and how they illuminate and reveal the content of a person's character.

IV

As previously noted, in the course of cross-examining defendant, the prosecutor made repeated references to the record-keeping requirements contained in Rule 1:21-6. Overruling defendant's objections, the court permitted the prosecutor to revisit this issue in her summation to the jury. The prosecutor also was permitted, over defendant's objections, to make the following remarks:

> I would submit to you that the defense argument that [the Ferrys] got their money therefore, he didn't have any criminal intent and he didn't commit a theft, that is ridiculous. I'll give you a whole bunch of examples.
>
> Somebody who is shoplifting at a store and gets caught by the security guard on the way out and then says well, I still have it inside my

> pocket. Here, you can have it back. So now I didn't commit shoplifting. Or somebody goes into a person's house and commits a burglary and takes an expensive piece of jewelry and [sic] witness sees who the person is and [sic] person gets away.
>
> * * *
>
> And then an arrest warrant is issued for that person and 11 months later the person is arrested, and then the person says oh, here's that watch. You can have it back now. I didn't commit the burglary. And there's no theft because I didn't have any intent. And, you know, if the person had asked me enough times for their watch back I would have given it to them.

Prosecutors are afforded considerable leeway in arguing the State's case to the jury "as long as their comments are reasonably related to the scope of the evidence presented." State v. Frost, 158 N.J. 76, 82 (1999). Prosecutors may suggest legitimate inferences that may be drawn from the record, but they exceed the bounds of fair comment if they go "beyond the facts before the jury." State v. Harris, 156 N. J. 122, 194 (1998), cert, denied, 532 U.S. 1057, 121 S. Ct. 2204, 149 L. Ed. 2d 1034 (2001). Simply stated, prosecutors are not permitted to make inaccurate legal or factual assertions during summation. Frost, supra, 158 N. J. at 85; State v. Rodriguez. 365 N. J. Super. 38, 48 (App. Div. 2003), certif. denied, 180 N. J. 150 (2004). "They are duty-bound to confine their comments to facts revealed during the trial and reasonable inferences to be drawn from that evidence." Frost, supra, 158 N.J. at 85.

The comments at issue here were not an inaccurate statement of facts adduced at trial. Instead, the prosecutor used a series of hypothetical scenarios that she asserted were analogous to the facts of the case. The crime for which defendant was charged, however, bore no resemblance to the crime of shoplifting or burglary of a watch, where the crime is complete at a definite point in time. Because defendant did, at one point, disburse the funds to the Ferrys, there was a legitimate and critical threshold issue for the jury to decide; that is, whether an actual crime had been committed.

Moreover, at no point in the presentation of evidence or during summation did the prosecutor clarify for the jury the State's position as to when the crime was committed. Without legal guidance in this area, the jury was left on its own to determine when the theft crime was completed by defendant. Was it: (1) when defendant wrote $50,000 worth of checks from his trust account in January 1999; (2) when defendant told Mrs. Ferry that he needed to get a tax clearance certificate before he could release the funds; (3) when defendant represented to Mr. Ferry that the money would be available to payoff his second mortgage, thereby making the refinance of his existing mortgage possible; (4) when the Prosecutor's Office decided to investigate; or (5) at some other point entirely?

The State bears the burden of proving each and every element of a crime. State v. Ragland, 105 N.J. 189, 196 (1986). By relying on factual scenarios completely unrelated to the crimes for which defendant was charged, the prosecutor's hypothetical scenarios improperly suggested to the jury that it was unnecessary for the State to prove at what point defendant's conduct became criminal.

Determining that a prosecutor's summation exceeded the bounds of fair comment on the evidence is insufficient, in

and of itself, to warrant reversal. We must also determine whether these comments were so prejudicial that they deprived defendant of his constitutional right to a fair trial. State v. Michaels, 264 N.J. Super. 579, 636 (App. Div. 1993), aff'd. 136 N.J. 299 (1994). In making this determination, we must consider: (1) whether defense counsel interposed a timely objection to the remarks; (2) whether the remarks were withdrawn; and (3) whether the court ordered the remarks stricken and instructed the jury to ignore them. Frost, supra, 158 N. J. at 83; State v. Marshall, 123 N.J. 1, 153 (1991), cert, denied, 507 U.S. 929, 113 S. Ct. 1306, 122 L. Ed. 2d 694 (1993).

Here, the prejudice caused by the prosecutor's remarks was left unchecked by the trial court. That is, by overruling defense counsel's timely objection, the court missed the opportunity to mitigate the harm by issuing a properly tailored instruction directing the jury to disregard the prosecutor's statements. Overruling defendant's objection also communicated to the jury the court's tacit endorsement of the prosecutor's incorrect expressions of the applicable law.

V

Defendant argues that his due process rights were violated by the trial court in three distinct rulings: *(I)* permitting the State to cross-examine him on whether he kept his trust account ledgers in accordance with the requirements of Rule 1:21-6; (2) permitting the prosecutor to refer to the Rule's requirements in the course of her summation; and (3) submitting the entire text of the Rule to the jury without the benefit of—any judicial guidance as to its applicability to the facts and legal issues of this case. According to defendant, these rulings allowed the State "to mix and blur the line between civil and criminal concepts and prohibitions" and "create[] a double standard for a

criminal violation of N.J.S.A. 2C:20-9."

We agree, in part, with defendant's arguments. The trial court correctly ruled that evidence showing defendant's failure to comply with the Rule's requirements was relevant to the jury's determination of guilt or innocence. The error here lies in the court's failure to limit the scope of the prosecutor's cross-examination of defendant. This error was compounded when the court permitted the jury to receive the entire text of this complex rule of accounting, without any instruction as to how it related to the issue of defendant's criminal intent.

Rule 1:21-6 is included in the New Jersey Court Rules Chapter III, pertaining to "Practice of Law and Admission To Practice." The Rule is entitled "Recordkeeping; Sharing of Fees; Examination of Records." R. 1:21-6. It has twenty-six sections and subparts, and is four pages long. Ibid. Judge Pressler's commentary on the Rule is another four-and-a-half pages. Pressler, Current N.J. Court Rules, comment on R. 1:21-6 (2005) .

The Rule provides extensive, detailed requirements for the maintenance of attorney trust and business accounts. R. 1:21-6. The Rule: (1) establishes the accounts that must be kept by the attorney, R. 1:21-6(a)(1) ; (2) provides for the location of the accounts and delineates the terms of agreements between the attorney and the financial institution, R. 1:21-6(b); (3) describes the records that must be maintained by the attorney, R. 1:21-6(c); and (4) specifies the location of the records, R. 1:21-6(d).

The sole judicial instruction provided to the jury on the relevance and use of the Rule was as follows:

S-125 is a New Jersey court rule regarding

> records, keeping of attorney trust fund [sic] and what kind of records you have to keep and how you have to keep them. You also heard testimony about them. So if you wish during your deliberations to refer to that or read it, that will be in evidence also. And you'll have that in with your packet of exhibits.

Thereafter, during the charge on the elements of the crime of misapplication of entrusted property, the court advised the jury that: "Having insufficient funds in one's trust account to cover an attorney's obligations to his client is not in and of itself a criminal violation."

The jury received no further instructions on (1) the general application of the Rule; (2) which of its twenty-six subsections were applicable to the issues in this-ease; (3) how to consider the prosecutor's extensive cross-examination of defendant's failure to keep sufficient funds in his trust and business accounts; and (4) the significance of the Rule in determining the issue of defendant's intent.

An attorney's criminal conviction is clearly relevant to a determination of whether the attorney also has violated the ethical standards encompassed in the rules of professional responsibility. Matter of Pepe, 140 N.J. 561, 568-69 (1995); Matter of Schaffer, 140 N.J. 148, 159 (1995). "Criminal conduct by an attorney is a particularly egregious form of unethical behavior." Matter of Pepe, supra, 140 N.J. at 568.

The use of civil standards as an aid in determining criminal conduct, however, is more carefully restricted. In "limited and ancillary contexts," civil standards may be applicable to resolution of particular issues in criminal cases. State v. Damiano, 322 N.J. Super. 22, 50 (App. Div. 1999),

certif. denied, 163 N.J. 396 (2000). New Jersey courts largely have considered the issue in the context of the standards embodied in the Uniform Commercial Code (UCC).

UCC rules have been used to establish value in civil cases and may be employed to assist a jury in determining the amount of a theft. See State v. Burks, 188 N.J. Super. 55, 60 (App. Div.), certif. denied, 93 N.J. 285 (1983); State v. Romero, 95 N.J. Super. 482, 487 (App. Div. 1967). We have also utilized the UCC in employee embezzlement cases. State v. Lamb, 125 N.J. Super. 209, 215-216 (App. Div. 1973). In Lamb, citing N.J.S.A. 12A: 2-401 (2) , we deemed the crime of embezzlement to have been completed when defendant, the company's receiving clerk, signed a document acknowledging receipt of the goods. Ibid. We recognized that under the UCC, "title to goods passes to the buyer upon delivery, unless otherwise specifically agreed." Id. at 216. We have declined, however, to apply UCC notions of title to permit the State to seize a boat that had been used in a fraudulent insurance scheme from a bona fide, innocent purchaser for value. State v. Somerset Cent. Corp., 216 N. J. Super. 716, 718-21 (App. Div. 1987).

In Damiano, supra, 322 N.J. Super, at 29-37, we disapproved of the manner in which a jury was instructed on UCC standards in a case involving allegations of theft by failure to make required disposition of property, misapplication of entrusted property, and theft by deception. The defendant in Damiano was an inexperienced and undercapitalized car dealer teetering on the brink of bankruptcy. Id. at 30-32. The evidence showed that he accepted payments and trade-ins for new cars but failed to payoff the liens on the trade-ins as he agreed to do. Id. at 32. He also resold traded-in cars to new customers without having paid off the prior liens, and failed to submit to the

manufacturers customers' payments for warranties on their vehicles. Id. at 32-33.

The trial court instructed the jury in various aspects of the UCC and contract law. Id. at 39-41, 49. We held that the trial court failed to properly focus the jury's attention on the issue of intent, because it merely instructed the jury on the UCC standards without relating how the standards should be used in evaluating the facts relevant to the intent issue. Id. at 41-42. The violation of the stated UCC standards was not necessarily a criminal act. Id. at 40.

Speaking within the context of a business facing bankruptcy, we cautioned that, where criminal allegations arise from business dealings, accurate jury charges that relate the law to the facts are essential:

> Insolvency resulting in the inability to pay creditors does not by itself necessarily imply that there was criminal conduct involved or that the unpaid creditors were the victims of criminal conduct. If that were so, every bankrupt would be liable to criminal prosecution. Obviously the harm caused to the creditors of an insolvent business is always the proper subject of civil litigation. The question is when and under what circumstances it may also fairly be the subject of criminal liability. We think it plain that in order for criminal liability to attach to the individual acts or the course of conduct engaged in by a businessman on the brink of insolvency, there must be criminal intent and criminal culpability as defined by the criminal statutes. Obviously, criminal liability cannot attach simply because civil liability

attaches.

> Our careful scrutiny of the jury charge here persuades us of its essential and overall failure properly to apprise the jury of these distinctions. In general terms, there was inappropriate intermingling between civil and criminal concepts. More significantly, while the instructions as to the crimes charged followed the model jury charges, the judge failed to mold those charges to include the facts of the case or to adapt them where necessary .to those facts.
>
> [Id. at 36.]

In circumstances more similar to those here, the California Court of Appeals held that it was reversible error to instruct a jury considering charges of embezzlement against an attorney on the state's Rules of Professional Conduct with respect to attorney trust accounts. People v. Stein, 156 Gal. Rptr. 299, 302-03 (Cal. Ct. App. 1979). The defendant in Stein was charged with eighteen counts of grand theft by embezzlement, based on allegations that he "willfully and unlawfully took money entrusted to him by six separate clients such that [his] trust account had a deficit balance." Id. at 301. Stein wrote checks on the trust account to satisfy personal expenses when the balance was insufficient to meet the proven claims of clients. Ibid. His trust account had been overdrawn fourteen times in a two-year period; however, he maintained that he was unaware of the shortage until a later date, although he continued to write checks on the accounts once he knew. Ibid.

Stein denied that he ever "intentionally" took client trust money for his own uses. Id. at 302. Both sides

presented expert witnesses on the accepted methods of handling client trust accounts, and the California State Bar Rules of Professional Conduct pertaining to trust accounts. Ibid. The jury was instructed that evidence presented "'tending to show that the defendant may have violated' the applicable rules . . . may be considered 'only insofar as it may tend to prove that the defendant possessed the specific intent required . . . .'" Ibid.

The Court of Appeals held:

> [I]t was improper to use the professional rules of conduct to show that a violation of the rules, if any, would tend to prove that defendant possessed the specific intent required when, in fact, the violation of the rules, if any, could have occurred without any criminal intent. Even though the instructions did not presume a violation of the rules, the only reasonable inference that the jury could have drawn was that evidence of a violation was in fact evidence establishing the required intent commit the crimes charged.
> [Ibid.1]

The Stein court found that the evidence failed to meet the general test for relevancy of indirect evidence because evidence of a violation of the rules "does not tend logically, naturally and by reasonable inference to prove or disprove the state of mind (specific intent) of the crime charged." Ibid. The embezzlement charge required proof of "the intent unlawfully to deprive the owner of the property or 'devote the same to his own use.[1]'" Id. at 303 (quoting 21 Cal. Jur. 3d (1975) Criminal Law, § 2258, p. 377; Perkins, Criminal Law, (2d ed. 1969) pp. 292-93).

Turning our attention to the matter before us, the

problem here was that the jury was provided with the text of a complex rule of professional accounting standards without any instructions on the relevance of the Rule to the issues before it. At no point was the jury instructed on which aspects of the Rule were relevant, to what issues, or how the Rule could assist the jury in reaching its decision. The court made no effort to assist the jury in distinguishing between the state of mind that established the violation of an ethical rule, and the level of criminal intent necessary to establish guilt with respect to a crime. The effect of the trial judge's one-sentence admonition was negligible in comparison to the prosecutor's extensive cross-examination and summation comments, which urged the jury to focus on the Rule's requirements and defendant's bookkeeping practices as indicative of his criminal behavior. We are thus compelled to reverse defendant's conviction.

We would be remiss, however, if we failed to give some guidance to the trial courts as to the proper use of the Rule in the context of a criminal trial. Rule 1:21-6 is, at its essence, a rule of accounting made particularly applicable to lawyers by virtue of the Supreme Court's plenary constitutional authority to regulate the practice of law. The Rule describes, in great detail, the recordkeeping requirements of both the lawyer's business accounts and trust accounts, where clients' funds are kept by the lawyer for a particular purpose.

With respect to trust accounts, the Supreme Court has stated:

> Our prior cases clearly establish that shoddy bookkeeping alone does not suffice for a finding of knowing misappropriation. Although an attorney's records may reveal repeated and frequent instances of being out

> of trust, that circumstance does not necessarily constitute knowing misappropriation. Poor accounting procedures, however, "are no excuse for using client's funds. It is no defense for lawyers to design an accounting system that prevents them from knowing whether they are using clients' trust funds. Lawyers have a duty to assure that their accounting practices are sufficient to prevent misappropriation of trust funds."
>
> [In Re Davis, 127 N.J. 118, 127 (1992) (internal citations omitted).]

In the context of a disciplinary case, however, an attorney's subjective intent is irrelevant. That is, once he makes improper use of client funds, it does not matter whether he intended to "borrow" or to permanently keep the funds. In Re Irizarry, 141 N.J. 189, 192 (1995).

Here, by contrast, the State must prove, beyond a reasonable doubt, that defendant engaged in "purposeful" conduct. In this context, shoddy recordkeeping, in violation of the Rule's requirements, may be invoked by defendant to negate the requisite mental state. Such a defense, however, can also be wielded as a sword by the State. It is entirely proper for the State to argue that this defense is purely pretextual, a clever attempt by defendant to conceal his true criminal purpose behind a fagade of incompetence and outright defiance of his ethical obligations.

Confronted by these competing characterizations, it is the court's obligation to guide the jury in its search for the truth. Proper jury instructions in this area must begin by emphasizing that the State bears the burden of proving defendant guilty beyond a reasonable doubt as to each and

every element of the crime. This burden is not diminished or transferred to defendant because he may have committed an ethical violation. The jury must be told that the accounting practices delineated in the Rule are relevant to determining defendant's state of mind, because they placed defendant on notice as to what was expected of him when he became the custodian of client funds. But, that is not the end of the jury's inquiry.

A violation of the Rule's requirements, in and of itself, is insufficient, as a matter of law, to sustain a finding of criminal culpability. However, together with any other evidence in the case, a jury may consider a violation of the Rule's requirements as evidence of defendant's purposeful conduct. The more egregious the violation, the greater its probative value is in assisting the jury in this determination. An extended pattern of conduct, displaying an utter disregard for the Rule's requirements, would have more probative value than an isolated incident of bad accounting.

VI

Defendant argues that denying him admission to the PTI program was a gross abuse of discretion and clear error of judgment, because the prosecutor failed to consider all the relevant facts and erroneously determined that defendant was presumptively ineligible under PTI Guideline 3(1)(4). Defendant contends that the prosecutor erroneously concluded that his status as an attorney meant that his crime involved a breach of public trust. He argues that the exclusion did not apply to him, because he was not a "public official" within the meaning of the PTI guidelines. We disagree. Given the facts of this case, the prosecutor's interpretation of Guideline 3(i)(4) was a proper exercise of his discretion.

A

On June 20, 2000, the Union County Prosecutor wrote to June Loughrey of the Union County Pre-Trial Intervention Program to object to defendant's admission to PTI: "This will confirm our telephone conversation that the above-referenced summonses charge Mr. Mahoney with two counts of third degree theft and two counts of third degree forgery. Notwithstanding same, this Office objects to Mr. Mahoney's admission into the Pre-Trial Intervention Program."

On August 8, 2000, defendant was sent a notice of rejection with an "Addendum/Update" from Marquita Sweet, a PTI team leader, which read as follows:

> REJECTION: GUIDELINE 3(i)-4
>
> YOUR OFFENSES, THEFT BY FAILURE TO MAKE REQUIRED DISPOSITION, MISAPPLICATION OF ENTRUSTED PROPERTY AND TWO COUNTS OF FORGERY WERE A BREACH OF PUBLIC TRUST, WHICH CONSTITUTES GROUNDS FOR REJECTION UNDER - H?TI GUIDELINES FOR OPERATION. IN DECEMBER 1998 YOU WERE HIRED TO REPRESENT THE VICTIMS IN A WRONGFUL DEATH LAWSUIT REGARDING THE DEATH OF THEIR SON AS A RESULT OF A MOTOR VEHICLE ACCIDENT. AS A LAWYER AND LONGTIME FRIEND OF THE VICTIMS YOU WERE ENTRUSTED TO BE THE FIDUCIARY OF FUNDS RECEIVED FROM THIS LAWSUIT.

INSTEAD WHEN YOU RECEIVED THE SETTLEMENT CHECK FROM THE INSURANCE COMPANY ($75,000), YOU FORGED THEIR SIGNATURES AND DEPOSITED THE CHECK INTO YOUR ACCOUNT. YOU THEN WROTE THREE CHECKS, TOTALING $50,000, (THE VICTIM'S SHARE) AGAINST THE BALANCE TO PAY FOR UNAUTHORIZED - EXPENSES. FOR APPROXIMATELY ONE YEAR YOU LIED TO THE VICTIMS, PROVIDING FALSE INFORMATION AS TO THE STATUS OF THE CHECK AND WHEN THEY WOULD RECEIVE THEIR SHARE OF THE MONEY. BANK ACCOUNT RECORDS REVEAL THAT YOUR BALANCE WAS INSUFFICIENT TO COVER THE AMOUNT OWED TO THE VICTIMS OVER THIS PERIOD OF TIME. THE VICTIMS DID NOT RECEIVE THEIR MONEY UNTIL 12-31-99 ALTHOUGH YOU DEPOSITED THE CHECK ON 1-20-99. YOU INDICATED THAT ALL THE MONIES HAVE BEEN PAID TO THE VICTIMS, HOWEVER, PTI NOTES THAT THIS DID NOT OCCUR UNTIL AN ACTIVE INVESTIGATION WAS COMMENCED BY THE PROSECUTOR'S OFFICE.

THE SERIOUS NATURE OF THE OFFENSE FAR OUTWEIGHS THE POSITIVE REHABILITATIVE FACTORS WHICH MIGHT BE PRESENT IN YOUR CASE. ACCEPTANCE INTO THE PTI

PROGRAM WOULD DEPRECATE THE SERIOUS NATURE OF THE OFFENSE. YOU ARE A LAWYER WHO WAS ENTRUSTED TO REPRESENT YOUR CLIENTS' BEST INTERESTS, AND TOOK ADVANTAGE OF A 20 YEAR FRIENDSHIP, AS WELL AS YOUR POSITION AS THEIR LEGAL ADVISOR DURING A VERY TRAUMATIC AND STRESSFUL TIME. THE VICTIMS TOTALLY RELIED UPON YOU TO DIRECT THEM AND YOU EXPLOITED THE SITUATION AND CONTINUED THIS MOCKERY FOR OVER 10 MONTHS. YOU STOLE MONEY FROM YOUR FORMER CLIENTS AND USED "LEGAL" EXCUSES AS TO WHY YOU COULD NOT DISBURSE THE MONEY. THIS SUBSTANTIATES A BREACH OF PUBLIC TRUST OF THE OFFICE YOU WERE SWORN TO UPHOLD.

FURTHERMORE, YOU MINIMIZED YOUR INVOLVEMENT. YOU DID NOT ACT IN THE BEST INTEREST OF YOUR CLIENTS BY YOUR DEMONSTRATED BEHAVIOR. YOU LESSEN YOUR INVOLVEMENT BY CLAIMING THAT THE VICTIMS DID NOT CALL "TO DEMAND THEIR MONIES", BUT INSTEAD WOULD "OFTEN CALL TO INQUIRE ABOUT THE STATUS OF THE CASE". YOUR PROFESSIONAL EXPERTISE SHOULD HAVE ALERTED YOU THAT THE VICTIMS WERE INQUIRING ABOUT THEIR MONIES TO

> WHICH THEY WERE CLEARLY ENTITLED. THIS KIND OF PROFESSIONAL BRASHNESS CANNOT BE TOLERATED BY SOCIETY AND DISTINCTLY WARRANTS A REJECTION OF YOUR CASE.

Although not entirely clear from the record, it appears that the prosecutor adopted the August 8, 2000 letter from the PTI team leader. In rejecting defendant's challenge, the trial court accepted the prosecutor's position that defendant was presumptively excluded from PTI because he had been charged with offenses involving a breach of public trust.

B

Application for PTI is initially made to the criminal division manager who conducts an evaluation and makes a recommendation to the prosecutor. R. 3:28(h). In conducting their evaluations, the director and the prosecutor must consider the factors set forth in both N. J.S.A. 2C: 43-12 and R. 3:28, Guideline 3. No crimes are per se excluded from enrollment in PTI. State v. Brooks, 175 N.J. 215, 224 (2002). Any defendant charged with *a* crime is eligible. R. 3:28, Guideline 2. However, Guideline 3 provides:

> [T]he nature of the offense is a factor to be considered in reviewing the application. If the crime was (1) part of organized criminal activity; or (2) part of a continuing criminal business or enterprise; or (3) deliberately committed with violence or threat of violence against another person; or (4) a breach of the public trust where admission to a PTI program would deprecate the seriousness of

defendant's crime, the defendant's application should generally be rejected.

rR. 3:28, Guideline 3(i) (emphasis added).]

The public policy and statutory scheme of the Pre-Trial Intervention program is set forth at N.J.S.A." 2C:43-12 and -13, supplemented by guidelines adopted by the Supreme Court pursuant to N. J.S.A. 2C: 43-14. The purpose of PTI is to augment the options afforded a prosecutor in disposing of criminal matters. Brooks, supra, 175 N.J. at 223. A prosecutor's decision with respect to a PTI application is entitled to great deference. State v. Baynes, 148 N. J. 434, 443 (1997). In particular, a prosecutor's rejection of an applicant "will rarely be overturned" by a court. Brooks, supra, 175 N.J. at 225.

A defendant seeking to overturn a prosecutor's rejection must establish "clearly and convincingly" that the prosecutor's decision amounted to *a* "patent and gross abuse of discretion." Baynes, supra, 148 N.J. at 444 (quoting State v. Wallace, 146 N.J. 576, 582 (1996)). The standard is met if defendant can "show that the prosecutor's decision failed to consider all relevant factors, was based on irrelevant or inappropriate factors, or constituted a 'clear error in judgment.'" State v. Nwobu, 139 N.J. 236, 247 (1995).

The concept of a "clear error in judgment" is akin to the standard where the judicial conscience is "shocked" by the patently unreasonable application of guidelines to the particular facts of a case. Id. at 253-54. The decision must be one that "could not have reasonably been made upon a weighing of the relevant factors." Id. at 254 (quoting State v. Roth, 95 N.J. 334, 366 (1984)).

Because the issue of whether a prosecutor has

exercised his or her discretion based on inappropriate factors is a question of law, Nwobu, supra, 139 N.J. at 247, upon a finding of clear prosecutorial error, a court may order that defendant be directly admitted into PTI. State v. DeMarco, 107 N.J. 562, 567 (1987). In addition, "if a reviewing court finds that a prosecutor's decision was arbitrary, irrational, or otherwise an abuse of discretion, although not a patent and gross abuse, and if the court is satisfied that the remand will serve a useful purpose, it may send the case back to the prosecutor." State v. Kern, 325 N.J. Super. 435, 439-40 (App. Div. 1999).

However, a reviewing court must avoid substituting its judgment for that of the prosecutor. Nwobu, supra, 139 N.J. at 254. Moreover, a trial court proceeding on a PTI application "should not constitute a trial de novo on the applicant's admissibility, but should be confined to a review of the prosecutor's actions." State v. Leonardos. 73 N. J. 360, 383 (1977).

C

Here, defendant is charged with crimes that involved an abuse of his authority to establish and maintain his trust account for the exclusive purpose of safeguarding client funds. That authority flows directly from the constitutional power of the Supreme Court to grant to the lawyer a license to practice law. A lawyer assumes this custodial role as an incident of his or her status as an officer of the court. In this capacity, a lawyer's interactions with the public carry the imprimatur of the court, and the public's faith and confidence in the lawyer's integrity is inextricably linked to and derived from this official relationship.

Chief Justice Wilentz eloquently explained the historical basis for the public' s view of the lawyer as holding a position of special trust:

> Having sought his advice and relying on his expertise, the client entrusts the lawyer with the transaction — including the handling of the client's funds. Whether it be a real estate closing, the establishment of a trust, the purchase of a business, the investment of funds, the receipt of proceeds of litigation, or any one of a multitude of other situations, it is commonplace that the work of lawyers involves possession of their clients' funds. That possession is sometimes expedient, occasionally simply customary, but usually essential. Whatever the need may be for the lawyer's handling of clients' money, the client permits it because he trusts the lawyer.
>
> It is a trust built on centuries of honesty and faithfulness. Sometimes it is reinforced by personal knowledge of a particular lawyer's integrity or a firm's reputation. The underlying faith, however, is in the legal profession, the par as an institution. No other explanation can account for clients' customary willingness to entrust their funds to relative strangers simply because they are lawyers.
>
> fin re Wilson, 81 N.J. 451, 454-55 (1979).]

We find further support for the prosecutor's position in State v. Bender, 80 N.J. 84 (1979). The facts in Bender involved a pharmacist who became addicted to cocaine. He diverted quantities of drugs from the stock of the pharmacy where he was employed to maintain his supply of the illicit drug. Id. at 90. The prosecutor in that case applied Guideline 3(i)(4) to reject defendant's PTI application, concluding that

Bender held a position of public trust by virtue of being a licensed pharmacist.

In reversing the prosecutor's decision, the Court made the following comments:

> We also cannot accept the State's contention that defendant's crime constituted "a breach of the public trust." Guideline 3(i)(4). It is true that in issuing a license, the State entrusts a pharmacist with the dispensing of controlled dangerous substances in order that the health and welfare of the public not be undermined through indiscriminate and unsupervised consumption of drugs. See N.J.S.A. 24:21-1 et seq. Whether this "entrusting" is sufficient to make a pharmacist not employed by the State a "public trustee" under Guideline 3(i)(4) is a difficult question which we need not here address. For even assuming that a pharmacist can be so characterized, the crimes here charged would not constitute a breach of that trust.
>
> Defendant's cocaine diversions were not intended to nor did they cause injury to the public in general or to any particular segment thereof. The cocaine was personally consumed, not distributed to third parties. Only defendant, himself, and his immediate employer were victimized. Thus, although defendant's crimes were made possible by his status as a licensed pharmacist, those crimes did not breach the trust reposed in him to protect the citizenry at large.

[Id. at 96 (emphasis added).]

By contrast, defendant's crimes here directly involved use of his authority as a lawyer to cause harm to his clients. He took advantage of "the trust reposed in him" to misappropriate his clients' funds.

We thus conclude our discussion of this issue by emphasizing that, although defendant's status as a lawyer does not operate as a per se impediment for consideration for enrollment into PTI, we are satisfied that the trial court correctly determined that defendant failed to show, by clear and convincing evidence, that the prosecutor's application of the presumption of ineligibility articulated in Guideline 3(i)(4) constituted a patent abuse of discretion.

VII

Defendant's conviction is reversed based on the trial court's improper limitation of character witness testimony, inadequate jury instructions on the use of Rule 1:21-6, and the prosecutor's inappropriate remarks during summation. The matter is remanded for a new trial.

APPENDIX- E

REED SMITH LLP. One Riverfront Plaza Newark, New Jersey 07102-5400	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - UNION COUNTY
STATE OF NEW JERSEY, Plaintiff, v. ANTHONY M. MAHONEY, Defendant.	Summons Nos. S932328, S932239 CRIMINAL ACTION ORDER

The within matter having come on before the Court on an Appeal from a denial of PTI by the Union County Prosecutor's Office and the Director and the Court having heard oral argument and having had the opportunity to review the moving papers both for and against admission to PTI and the Court being of the opinion that justice requires

IT IS on this 5 day of December, 2000

ORDERED that the decision of the Union County Prosecutor denying admission into PTI by the defendant herein is hereby affirmed and the appeal therefrom is denied; and it is

FURTHER ORDERED that a copy of this Order shall be served upon all counsel of record within five (5) days of

receipt.

S/_____
Hon. John S. Triarsi, J.S.C.

APPENDIX - F

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
CRIMINAL DIVISION

Indictment No. 00-12-016

Filed
January 31, 2003
Stuart Peim.
J.S.C.

STATE OF NEW JERSEY

v.

ANTHONY MAHONEY

This matter having been opened to the Court on motion by Dennis Mahoney, and John J. Fahy, Esqs., attorneys for the defendant, and Anne Luvera, Assistant Prosecutor, and the Court having heard arguments of counsel and for good cause shown:

It is on this 31st day of January 2003.

ORDERED that Defendant's Motion for a Judgment of Acquittal and/or in the alternative a Motion for a New Trial is hereby denied for the reasons set forth on the record.

S/_____
Stuart Peim, J.S.C.

APPENDIX - G

PG# 00002183-001

State of New Jersey v. Anthony M. Mahoney Defendant (Specify complete Name)	New Jersey Superior Court Union County Law Division - Criminal [X] Judgment of Conviction [ ] Change of Judgment [ ] Order for Commitment [ ] Indict/Accusation Dismissed [ ] Judgment of Acquittal

ORIGINAL CHARGES

Ind/Acc No.	Count	Description	Degree	Statute
00-12-01618-I	1	Theft by Failure To Make Required Disposition of Property	3rd	2c:20-9
	2	Misapplication of Entrusted Property	3rd	2c:21-15
	3	Forgery	4th	2c:21-1a (2) and/or (3)
	4	Forgery	4th	2c:21-1a (2) and/or (3)

Count	Description	Degree	Statute
1	Theft by Failure to Make Required Disposition of Property	3rd	2c:20-9
2	Misapplication of Entrusted Property	3rd	2c:21-15
3	Forgery	4th	2c:21-1a (2) and/or (3)
4	Forgery	4th	2c:21-1a (2) and/or (3)

APPENDIX - H

THEODORE J. ROMANKOW
Prosecutor of Union County
32 Rahway Avenue
Elizabeth, NJ 07202
(908) 527-4500
Attorney for the State of New Jersey

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
INDICTMENT NO. 00-12-01618

CONSENT ORDER

STATE OF NEW JERSEY
Plaintiff,

v.

ANTHONY MAHONEY,
Defendant.

THIS MATTER having been opened to the Court by Assistant Prosecutor Ann M. Luvera, appearing on behalf of Theodore J. Romankow, Prosecutor of Union County, and with the consent of Dennis M. Mahoney, Esq. appearing on behalf of defendant, Anthony M. Mahoney, for an Order for dismissal of Counts 1 and 2 of Indictment No. 00-12-01618, charging defendant with third degree theft by failure to make required

disposition of property contrary to N.J.S.A, 2C:20-9 and third degree misapplication of entrusted property, contrary to N.J.S.A. 2C:21-15, and vacation of sentencing relating to the aforementioned Counts, and the Court having found good cause for the relief being sought.

IT IS on this ____ day of ____ 2006.

ORDERED that Counts 1 and 2 of Indictment No: 00-12-01618 be dismissed.

IT IS FURTHER ORDERED that defendant's sentence as it relates to Counts 1 and 2 be vacated, including any fines, community service or probationary term contained therein, and

IT IS FURTHER ORDERED, that the probation department shall arrange the refund to the defendant in the sum of $3,301.00 paid by the defendant as part of the now vacated sentence on Counts 1 and 2 of the indictment, which sum has been verified by the probation department and

IT IS FURTHER ORDERED that the 3 year probationary term imposed upon the defendant on January 31, 2003, on Counts 3 and 4 of the indictment, having now been satisfied, defendant is therefore discharged from probation, and

IT IS FURTHER ORDERED that a copy of this Order shall be served upon all parties within _____ days of the date hereof.

_____

Hon. William L.E. Wertheimer

I hereby agree to the form and
content of the within Order.

DENNIS M. MAHONEY, P.A.
Attorney for the Defendant

_____

By: Dennis M. Mahoney, Esq.

APPENDIX - I

N.J.S. 2C:21-1 FORGERY AND RELATED OFFENSES

a. Forgery. A person is guilty of forgery if, with purpose to defraud or injure anyone, or with knowledge that he is facilitation a fraud or injury to be perpetrated by anyone, the actor

(1) Alters or changes any writing of another without his authorization;

(2) Makes, completes, executes, authenticates, issues or transfers any writing so that it purports to be the acts of another who did not authorize that act or of a fictitious person, or to have been executed at a time or place or in a numbered sequence other than was in fact the case, or to be a copy of an original when no such origianl exited; or

(3) Utters any writing which he knows to be forged in a manner specified in paragraphs (1) or (2).

APPENDIX - J

N.J.S. 2C:20-9 THEFT BY FAILURE TO MAKE REQUIRED DISPOSITION OF PROPERTY RECEIVED

A person who purposely obtains or retains property upon agreement or subject to a known legal obligation to make specified payment or other disposition, whether from such property or its proceeds or from his own property to be reserved in equivalent amount, is guilty of theft if he deals with the property obtained as his own and fails to make the required payment or disposition. The foregoing applies notwithstanding that it may be impossible to identify particular property as belonging to the victim at the time of the actor's failure to make the required payment or disposition.

APPENDIX - K

2C:43-12. Supervisory treatment–pretrial intervention

a. Public policy. The purpose of sections 2C:43-12 through 2C:43-22 o f this chapter is to effectuate a Statewide program of Pretrial Intervention. It is the policy of the State of New Jersey that supervisory treatment should ordinarily be limited to persons who have not previously been convicted of any criminal offense under the laws of New Jersey, or under any criminal law of the United States, or any other state when supervisory treatment would:

(1) Provide applications, on an equal basis, with opportunities to avoid ordinary prosecution by receiving earl rehabilitative services or supervision, when such by an applicant and when there is apparent causal connection between the offense charged and the rehabilitative or supervisory need, without which cause both alleged offense and the need to prosecute might not have occurred; or

(2) Provide an alternative to prosecution for applicants who might be harmed by the imposition of criminal sanctions as presently administered, when such an alternative can be expected to serve as sufficient sanctions to deter criminal conduct; or

(3) Provide a mechanism for permitting the least burdensome from of prosecution possible for defendants charged with "victimless" offense; or

(4) Provide assistance to criminal calendars in order to focus expenditure of criminal justice resources on matters involving serious criminality and severe correction problems; or

(5) Provide deterrence of future criminal or disorderly behavior by an applicant in a program of supervisory treatment.

APPENDIX - L

Rule 3:28 PRETRIAL INTERVENTION

GUIDELINE 3. In evaluating a defendant's application for participation in a pretrial intervention program, consideration shall be given to the criteria set forth in N.J.S.A. 2C:43-12(e). In addition thereto, the following factors shall also be considered together with other relevant circumstances:

(i) Assessment of the Nature of the Offense: Any defendant charged with crime is eligible for enrollment in a PTI program, but the nature of the offense is a factor to be considered in review the application. If the crime was (1) part of organized criminal activity: or (2) part of a continuing criminal business or enterprise: or (3) deliberately committed with violence or threat of violence against another person: or (4) a breach of the public trust where admission to a PTI program would depressed the seriousness of defendant's crime, the defendant's application should generally be rejected. A defendant charged with a first or second degree offense or sale or dispensing of Schedule I or II narcotic drugs as defined in L. 1970. C. 326 (N.J.S.A. 21:21-1 et seq) by persons not drug dependent should ordinarily not be considered for enrollment in PTI program except on joint application by the defendant and the prosecutor. However, in such cases, the applicant shall have the opportunity to present to the criminal division manager, and through the criminal division manager to the prosecutor any facts or materials demonstrating the applicant's amenability to the rehabilitative process, showing compelling reasons justifying the applicant's admission and establishing that a decision against enrollment would be arbitrary and unreasonable.

APPENDIX - M

N.J. Rule 1:21-6. Recordkeeping; Sharing of Fees: Examination of Records

(a) Required Trust and Business Accounts. Every attorney who practices in this state shall maintain in a financial institution in New Jersey, in the attorney's own name, or in the name of the partnership of attorneys, or in the name of the professional corporation of which the attorney is a member, or in the name of the attorneys for partnership of attorney by a whom employed:

(1) a trust account or accounts, separate from any business and personal accounts and from any fiduciary accounts that the attorney may maintain as executor, guardian, trustee, or receiver, or in any other fiduciary capacity, in which trust account or accounts funds entrusted to the attorney's care shall be deposited: and

(2) a business account in the which all funds received for professional services shall be deposited.

One or more of the trust accounts shall be the IOLTA account or accounts required by Rule 1:28A.

Other than fiduciary accounts maintained by an attorney as executor, guardian, trustee, or receiver, or in any other similar fiduciary capacity, all attorney trust accounts, whether general or specific, as sell as all deposit slips and checks drawn thereon, shall be prominently designated as an "Attorney Trust Account." Nothing herein shall prohibit any additional descriptive designation for a specific trust account. All Business accounts, as sell as all deposit slips and all checks drawn thereon., shall be prominently designated as an "Attorney Business Account." and "Attorney Professional Account." in an "Attorneys Offices Account." The IOLTA account or accounts

shall beach be designated "IOLTA Attorney Trust Account."

The names of institutions in which such primary attorney trust and business accounts are maintained and identification numbers of each account shall be recorded on the annual registration form filed with the annual payment, pursuant to Rule 1:20-!(b) and Rule 1:28-2, to the Disciplinary Oversight Committee and the New Jersey Lawyers' Fund for Client Protection. Such information shall be available for use in accordance with paragraph (h) of this role. For all IOLTA accounts, the account numbers, the name the account is under, and the depository institution shall be indicated on the registration statement. The signed annual registration statement required by Rule 1:20-(c) shall constitute authorization to depository institutions to convert an existing non-interest bearing account in an IOLTA account.

(b) Account Location: Financial Institution's Reporting Requirements. An attorney trust account shall be maintained only in New Jersey financial institutions approved by the Supreme Court which shall annually published list such approved institutions. A financial institution shall be approved it shall file with the Supreme Court an agreement, in a form provided by the Court, to report to the Office of Attorney Ethics in the event any property payable attorney trust account instrument is honored; any such agreement shall apply to all branches of the financial institution and shall not be canceled except on thirsty days' notice in writing to the Office of Attorney Ethics. The agreement shall further provide that all reports made by the financial institution shall be in the following format: (1) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depository; (2) in the case of instruments that are presented against insufficient funds but which instruments

are honored, the report shall identify the financial institution, the attorney or law firm, the account number, the date of presentation for payment and the date paid, as sell as the amount of the overdraft created thereby . Such reports shall be made simultaneously with, and within the time provided by law for notice of dishonor, of any; if an instrument presented against insufficient funds.

In addition, each financial institution approved by the Supreme Court must co-operate with the IOLTA Program, and must offer an IOLTA account to any attorney who wishes to open one. Nothing herein shall prevent an attorney from establishing a separate interest-bearing account for an individual client in accordance with these rules, providing that all interest earned shall be the sole property of the client and may not be retained by the attorney, and must from its income on such IOLTA accounts remit to the Fund the amount remaining after providing such institution a just and reasonable return equivalent to its return on similar non-IOLTA interest-bearing deposits. These remittances shall be monthly unless otherwise authorized by the Fund.

In addition to the reports specified above, approved financial institutions shall agree to cooperate fully with the Office of Attorney Ethics and to produce any attorney trust account or attorney business account records on receipt of a subpoena therefore. Digital images of these records may be kept and produced by financial institutions provided that: (a) imaged copies of checks shall, when printed, be limited to no more than tow checks per page (front and back) and (b) all digital records shall be maintained for a period charging an attorney or law firm for the reasonable cost producing the reports and records required by this Rule. Every attorney or law firm in this state shall be conclusively deemed to have

consented to the reporting and production requirements mandated by this Rule.

(c) Required Bookkeeping Records.

(1) Attorneys, partnerships of attorneys and professional corporations who practice in this state shall maintain in a current status and retain for a period of seven years after the event that they record:

(A) appropriate receipts and disbursements journals containing a record of all deposits in and withdrawals from the accounts specified in paragraph practice of law, specifically identifying the date, source and description of each item deposited as well as the date, payee and purpose of each disbursement. All trust account receipts shall be deposited intact and the duplicate deposit slip shall be sufficiently detailed to identify each item. All trust account withdrawals shall be made only by attorney authorized financial transfers as stated below or by check payable to a named payee and not to cash. Each electronic transfer out an attorney trust account must be made on signed written instructions from the attorney to the financial institution. The financial institution must confirm each authorized transfer by returning a document to the attorney showing the date of the transfer, the payee and the amount. Only an attorney admitted to practice law in this state shall be an authorized signatory on an attorney trust account, and only an attorneys hall be permitted to authorize electronic transfers as above provide; and

(B) an appropriate ledger book, having at least one single page for each separate trust client, for all trust accounts, showing the source of all funds deposited in such accounts the names of all persons for whom the funds are charges or withdrawals from such accounts, and the names of all persons to whom such funds were disbursed. A regular trial balance of

the individual client trust ledgers shall be maintained. The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total of moneys received in trust for the client and deducting the total of all moneys disbursed; and

(C) copies of all retainer and compensation agreements with clients; and

(D) copies of all statements to clients showing the disbursement of funds to them or on their behalf; and

(E) copies of all bills rendered to clients; and

(F) copies of all records showing payments to attorneys, investigators or other persons, not in their regular employ, for services rendered or performed; and

(G) originals of all checkbooks with running balances and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips, except that, where the financial institution provides proper digital images or copies thereof to the attorney, then these digital images or copies shall be maintained; all checks, withdrawal and deposit slips, when related to a particular client, shall include, and attorneys shall complete a distinct area identifying the client's last name or file number of the matter; and

(H) copies of all records, showing that at least monthly a reconciliation has been made of the cash records and cash disbursement journal totals, the checkbook balance, the bank statement balance and the client trust ledger sheet balances; and

(1) copies of those portions of each client's case file reasonably necessary for a complete understanding of the financial transactions pertaining thereto.

(2) ATM or cash withdrawals from all attorney trust accounts are prohibited.

(3) No attorney trust account shall have any agreement

for overdraft protection.

(d) Type and Availability of Bookkeeping Records. The financial books and other records required by paragraphs (a) and (c) of this rule shall be maintained in accordance with generally accepted accounting practice. Bookkeeping records may be maintained by computer provided they otherwise comply with this rule and provided further the printed copies and computer files in industry standard formats can be made on demand in accordance with this section or section (h). They shall be located at the principal New Jersey office of each attorney, partnership or professional corporation and shall be available for inspection, checks for compliance with the Rule and copying at that location by a duly authorized representative of the Office of Attorney Ethics. When made available pursuant to this rule, all such books and records shall remain confidential except for the purposes thereof or by directions of the Supreme Court, and their contents shall not be disclosed by anyone in such a way as to violate the attorney client privilege.

(c) Dissolutions. Upon the dissolution of any partnership of attorneys for of any professional corporation, the former partners or shareholders shall make appropriate arrangements for the maintenance by one of them or by a successor firm of the records specified in paragraph (e) of this rule.

(f) Attorneys Practicing with Foreign Attorneys or Firms. All of the requirements of this rule shall be applicable to every attorney rendering legal services in this state regardless whether affiliated with or otherwise related n any way to an attorney, partnership, legal corporation, limited liability company, or limited liability partnership formed or registered in another state.

(g) Attorneys Associated with Out of State Attorneys.

An attorney practices in this state shall maintain and preserve for seven years a record of all fees received and expenses incurred in connection with any matter in which the attorney was associated with an attorney of another state.

(h) Availability of Records. Any of the records required to be kept by this rule shall be produced in response to a subpoena duces tecum issued in connection with an ethics investigation or hearing pursuant to R. 1.20-1 to 1:20-11, or shall be produced at the direction of the Disciplinary Review Board of the Supreme Court. They shall be available upon request for review and audit by the Office of Attorney Ethics. Every attorney shall be required to cooperate and to respond completely to questions by the Office of Attorney Ethics regarding all transactions concerning records required to be kept under this rule. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege. When produced or examined during the course of a disciplinary or random audit, both the attorney or law firm and the producers and licensors of computerized software shall be conclusively deemed to have consented to eh use of said software by disciplinary authorities as evidence during the course of the disciplinary proceeding.

(i) Disciplinary Action. An attorney who fails to comply with the requirements of this rule in respect of the maintenance, availability and preservation of accounts and records or who fails to produce or to respond completely to questions regarding such records as required shall be deemed to be in violation of R.P.C. 1.15(d) and R.P.C. 8.1(b).

(j) Unidentifiable and Unclaimed Trust Fund Accumulations and Trust Funds Held for Missing Owners.

When, for a period in excess of two years, an attorney's trust account contains trust funds which are either unidentifiable, unclaimed, or which are held for missing owners, such funds shall be so designated. A reasonable search shall then be made by the attorney tot determine the beneficial owner of any unidentifiable or unclaimed accumulation, or the whereabouts of any missing owner. If the beneficial owner or an unidentified or unclaimed accumulation is determined, or if the missing beneficial owner is located, the funds shall be deliver to the beneficial owner when due. Trust funds which remain unidentifiable or unclaimed, and funds which are held for missing owners, after being designated as such, may after the passage of one year during which time a diligent search and inquiry fails to identify the beneficial owner or the wereabouts of a missing owner, be paid to the Clerk of the Superior Court for the deposit with the Superior Court Trust Fund. The Clerk shall hold the same in trust for the beneficial owners or the ultimate disposition as provided by order of the Supreme Court. All applications for a payment to the Superior Court Clerk under this section shall be supported by a detailed affidavit setting forth specifically the facts and all reasonable efforts of search inquiry and notice. The Clerk of the Superior Court may decline to accept funds where the petition does not evidence diligent search and inquiry or otherwise fails to confirm with this section.

APPENDIX - N

N. J. R. E. 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES EVIDENCE

(a) Character evidence generally. Evidence of a person's character or character trait, including a trait of care or skill or lack thereof, is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion except:

(1) Character of accused. Evidence of a pertinent trait of the accused's character offered by the accused, which shall not be excluded under Rule 403, or by the prosecution to rebut the same;

APPENDIX - O

N. J. R. E. 405 (b). METHODS OF PROVING CHARACTER

(b) Specific instances of conduct. When character or a trait of character of a person is an essential element of a charge, claim, or defense, evidence of specific instances of conduct may also be admitted.

APPENDIX - P

N. J. R. E. 406. HABIT, ROUTINE PRACTICE.

(a) Evidence, whether corroborated or not, of habit or routine practice is admissible to prove that on a specific occasion a person or organization acted in conformity with the habit or routine practice.

(b) Evidence of specific instances of conduct is admissible to prove habit or routine practice if evidence of a sufficient number of such instances is offered to support a finding of such habit or routine practice.

APPENDIX - Q

MAHONEY – DIRECT

Q. Over the course of the years how many clients have you had?

A. Up until 2000 somewhere in the neighborhood of about 2500 clients, and most of those clients almost exclusively are by word of mouth. . . .

Q. How do you know you've had over 2000 - - over 2500 clients?

A. Every client – when a client first walks in the door is given a client number. So if you go all the way back to 1974, the first client was number 1. If that client has a second matter it would be one dash one, one dash two. Mr. Ginsberg's number was number 26. He – in 2000 his dash number was 85.

Q. So what does that mean?

A. Means he's had 85 additional matters after the first matter that he brought in the office. Now he's a businessman and he's obviously was with me over 25 years and has had many business matters. . . .
(18T57-15 TO 18T58-17).

MAHONEY – CROSS

A. In reviewing that account 947 some odd thousand dollars went through that account that year and yes, there was sufficient funds going in and out of that account.
(19T194-16-19).

A. In this Clark called up specifically and asked to be a co-administrator. I agreed to do that and he was qualified.
(19T198-13-15).

APPENDIX – R

THE COURT: I think my ruling was clear that character witnesses are not gonna testify as to specific instances.

COUNSEL: I understand.

THE COURT: They're gonna testify as to their opinion and/or reputation testimony, and in a general sense what their contact was either with the community at large from which the reputation is coming that they're testifying about, or their general contact with the defendant.
(13T51-18 to 13T52-3).

APPENDIX - S

The Court: When you ask all of these people the pertinent opinion questions I would like you to ask them those questions in a leading fashion. I would like you also to instruct, to tell your witnesses that they are not to blurt out anything about compassion, anything about quality of services, anything about anything that their opinion regarding the trustworthiness, truthfulness and integrity. Like I say, I'd like that done through leading questions.

(15T101-23 to 15T102-6).

APPENDIX - T

THE COURT: Well I'd like you in a general sense to just make sure your witnesses understand what my ruling is and they conform to it. As I said earlier, I think at some points you're gonna have to ask, you know, some very structured questions about, you know – and what it is, then I assume the State's gonna object and I'm gonna ask you to rephrase the question because if you ask that question that way, none of us have any idea what's gonna come out. So you're gonna have to say do you have an opinion as to X, do you have an opinion as to Y. (13T87-17 to 13T88-3).

APPENDIX - U

ORISCELLO – CROSS

Q. And can we agree that, and I think you testified that when somebody has coronary artery disease and they have angioplasty, they have to make lifestyle changes.

A. Not because of the angioplasty, but because of the disease in order to reduce the risk factors of it happening again. . . .

Q. Is stress a factor in coronary artery disease?

A. Absolutely; considered a major risk factor.

Q. Major risk factor. How is stress a major risk factor?

A. Reason that stress is a major risk factor, what it does to your lipids, to your blood pressure and to your heart rate, when you're under stress you have a natural occurring, it's called a catecholamine storm. You're always under the influence of sympathetic nervous system. That's an automatic nervous system where you have a lot of the adrenalin circulating day in day out. That leads to noxious complications such as blood pressure elevation, heart rate elevation, altered glucose metabolism and altered lipid metabolism. These things can be temporarily, maybe permanently reversed by altering the stress in one's life.
(20T175-4 to 20T176-14).

APPENDIX - V

GINSBERG – DIRECT

It was his practice to explain to me the client, to my sons who were his clients, my daughter who was a client, other friends who was clients when we talked about the case or even, I even had one of my employees go to Mr. Mahoney, and to my knowledge he always explained to them what was happening and either through the telephone or actual meetings so they were totally aware of how the case was proceeding. (15T47-18-25).

APPENDIX - W

PROSECUTOR'S SUMMATION

Ms. Luvera: . . . .the State submits to you that the defendant signed their names on that check without authorization; and that the purpose in him signing that check without their authorization was to defraud them or to commit the theft that he ultimately did commit. (22T29-9-14).

APPENDIX - X
RULE 104 HEARING – ROBERT KATZ

You know we started off as a developer and realtor, then it went to individuals as friends. He represented me as the attorney with several matters and, you know, I found him to be, you know, good at what he does, professional. He was honest with me. He was honest with the numerous tenants we did business with.
(13T97-7-13).

BEFORE THE JURY

Q. As to his honesty?

A. He's a very honest individual my opinion, you know, my dealings with him for 20 years. Never lied to me. He's always been honest and truthful. And I found him to very ethical in everything he's done for me whether he's on the personal side or on business or represented me as an attorney.

MS. LUVERA: Judge, I'm going to ask that the last comment be stricken.

THE COURT: The objection is sustained. You are to disregard the testimony of the witness regarding his opinion about the ethical or the ethics of the defendant. Proceed.
(14T39-3-15).

APPENDIX - Y

PRE-TRIAL MOTION – EXCERPTS OF ORAL ARGUMENT

MR. FAHY: Because Mrs. Ferry would complain to him about the marriage. But for different – at different points in time she wanted to get out, but for financial reasons she couldn't get out. (7T11-22-25)

THE COURT: Why do you need to introduce any more evidence for that other than that Mr. Ferry is not the father of the child; that he views them as litigious people I guess because he's represented them in three cases. I don't know. Maybe he's consulted with them about more, and that he felt the need to do certain legal things or take certain legal steps or file certain legal papers as a result of those two facts.
(7T12-7-15)

THE COURT: So what Mr. Fahy is trying to do here is to close – he's gonna explain the delay pre diagnosis with this bond, and then the delay post diagnosis with the stress disorder, medication, medical treatment, medical procedures .. . . .
So he needs to close this gap and that's how he's doing it, going to try and do it I should say.

(7T20-10-17)

THE COURT: Mr. Fahy, I will also allow your client to testify, without going into the underlying details, that Mrs. Ferry told him that she was having some marital difficulties.
(7T30-4-7)

Stephens; Bonnie Soodek; Tom Pickering; Ken Higgins; Martha Ries; Dinesh Keskar; Mike Coker; Linda Enebrad; Butch Moody; Kevin King; **Boeing Business Associate, Air India:** - Mr. V. Thulasidas.

Pierce County: Council:- John Ladenburg; Shaun Bunney; Paul Bocchi; Barbara Gelman; Calvin Goings; Terry Lee; Harold Moss; Kevin Wimsett; **Pierce County Sheriff's:-** Paul Pastor; Graig Adams; Deputy Bram; **Pierce County Prosecutors:-** Gerald Horne; Gerald Costello; Daniel R. Hamilton.

Tacoma City: Councilors:- Bill Baarsma; Bill Evans; Connie Ladenburg; Mike Lonergan; Sharon McGavick; Doug Millar; Bil Moss; Kevin Phelps; Rick Talbert; **Tacoma Police:-** Donald Ramsdell; Catherine Woodard; **Attorney:** Jon J. Walker.

City of Gig Harbor: Police Department:- Mike Davis, Mitch Barker; Officer Entze. **Attorney:** Carol A. Morris.

Maureen E. Keyter; Attorney Mike Turner.

APPENDIX 2 [TO MOTION FOR INJUNCTION]
The dossier titled "State-supported Tyranny upon the Populace" is filed separately due to its bulk.

APPENDIX 3 [TO MOTION FOR INJUNCTION]
The dossier titled "Dossier of Crimes" is filed separately due to its bulk.

APPENDIX 4 [TO MOTION FOR INJUNCTION]
Addendum of Statutes.

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